

CLERK'S COPY.

Supreme Court of the United States

No. 117

ORIGINALLY INCORPORATED PETITIONER

PENNSYLVANIA INSURANCE COMPANY OF AMERICA
vs. RICHARD SIMKINS, GEORGE FLORENCE

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT

WRIT OF HABEAS CORPUS GRANTED NOVEMBER 3, 1911.

WRIT OF HABEAS CORPUS GRANTED NOVEMBER 3, 1911.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 9333

CRITES, INCORPORATED,
Defendant-Appellant,
vs.

THE PRUDENTIAL INSURANCE COMPANY,
OF AMERICA, *Plaintiff,*

AND

RICHARD SIMKINS AND GEORGE FLORENCE,
Receivers,
Appellees.

CIVIL NO. 927.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

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CAPTION.

UNITED STATES OF AMERICA,
IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

**PETITION TO RECOVER MONEY ON NOTE, TO FORE-
CLOSE MORTGAGE, AND FOR THE APPOINTMENT
OF A RECEIVER.**

(Filed February 17, 1932.)

*To the Honorable Benson W. Hough,
Judge of the District Court of the United States,
For the Southern District of Ohio,
Eastern Division:*

I.

INTRODUCTION.

1. The Prudential Insurance Company of America is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal office and place of business in the city of Newark, in the County of Essex, in the State of New Jersey, and in the District of New Jersey. It is a resident and citizen of said District of New Jersey, in said State of New Jersey. It brings this its bill in equity against Henry M. Crites, a resident and citizen of the County of Pickaway, in the State of Ohio, and a resident and citizen of the Eastern Division of the Southern District of Ohio; and, against May R. Crites, a resident and citizen of the County of Pickaway, in the State of Ohio, and a resident and citizen of the Eastern Division of the Southern District of Ohio; and, against Crites, Inc., a corporation organized under the laws of the State of Ohio, with its principal office and place of business in the City of Circleville, Pickaway County, Ohio, and a resident and citizen of the Eastern Division of the Southern District of Ohio.

II.

GROUNDS OF JURISDICTION.

2. The petitioner represents to the Court that the grounds on which the jurisdiction of this Court is based are as follows, to-wit:

3. This is a suit in equity between citizens of different states of the United States. The petitioner and plaintiff is a citizen and a resident of a different state from each and every defendant. The matter in controversy exclusive of interest and costs exceeds the sum of Three Thousand (\$3,000.00) Dollars.

III.

ULTIMATE FACTS.

First Cause of Action.

4. There is due the petitioner and plaintiff, the Prudential Insurance Company of America, from the defendants, Henry M. Crites and May R. Crites, the principal sum of Thirteen Thousand (\$13,000.00) Dollars, which it claims with interest thereon at the rate of $5\frac{1}{2}$ per cent. per annum from December 1, 1931, to date, and 8 per cent. per annum from this date, together also with Seven Hundred Fifteen (\$715.00) Dollars, interest accrued on December 1, 1931, with interest at 8 per cent. on said accrued interest, on a certain promissory note, a photostatic copy of which, together with all credits and endorsements, is attached hereto, filed herewith, by reference made a part hereof, and marked Exhibit "A." There are no credits on said note.

5. Said note contains the following express provision:
" . . . and with interest on this note after maturity and on all accrued interest after maturity, at the rate of 8 per cent. per annum, payable annually.

If default shall be made in the payment of either principal or interest when due or any part thereof, the whole principal sum and interest accrued shall become due and payable at the option of the legal holder hereof."

6. The defendants have wholly breached the terms of said principal promissory note and the mortgage deed set

out in the Second Cause of Action herein, in this, to-wit:

That when the installment of interest, in the sum of Seven Hundred Fifteen (\$715.00) Dollars became due and payable on December 1, 1931, the same was not paid, and has not since been paid, but remains delinquent and bears interest at 8 per cent. from its due date; and the petitioner has exercised its right and option to declare the entire principal sum due, together with interest from December 1, 1931 to this date at $5\frac{1}{2}$ per cent. per annum, and 8 per cent. thereafter.

Second Cause of Action.

7. The petitioner and plaintiff, for a second and further cause of action, repeats and by reference adopts literary paragraphs one (1) to six (6) inclusive under the First Cause of Action, and for its Second Cause of Action, says:

8. At the time of the execution of the note set out in the First Cause of Action, to-wit, October 17, 1929, the defendants, Henry M. Crites and May R. Crites, his wife, were indebted to the petitioner in the sum of Thirteen Thousand (\$13,000.00) Dollars, for money borrowed. To secure the re-payment of said indebtedness, as evidenced by said promissory note, said defendants Henry M. Crites and May R. Crites, his wife, being at the time, to-wit, October 17, 1929, the owners in fee simple of the following described real estate in Madison County, Ohio:

(Description omitted by stipulation.)

duly executed and delivered to the petitioner their mortgage deed of that date and thereby conveyed and warranted to the petitioner and plaintiff in fee simple the above described real estate, subject, however, to defeasance; conditioned on the payment of the indebtedness represented by said principal promissory note according to its terms; and conditioned further as follows, to-wit:

"That the grantors hereof, * * * shall pay the said note and interest promptly as they become due, and shall pay when they become due all taxes and assessments of every kind * * * upon said premises * * * keep the improvements on said real estate insured in such forms of insurance as may be required by the grantee, or its successors or assigns, in amounts satis-

factory to the said grantee, for the benefit of said grantee, * * * and to deliver to the said grantee * * * all policies and renewal receipts * * * to be held until said note and interest are fully paid. And in the event of non-payment at maturity of the principal of said note or any interest therein named, * * * or on failure to comply with any conditions of this deed, then the rents of the real estate herein described shall immediately accrue to the benefit of said grantee, * * * and the occupant or occupants of the within described real estate shall then pay rent to the said grantee, * * * Only, and said note may then become due at the option of the said grantee * * * and interest thereon be computed at the rate of 8 per cent. per annum payable annually, from the date of such default. And foreclosure hereof may be instituted at the option of the said grantee * * * but said grantee * * * shall not be required to give any notice whatsoever of an intention to exercise said option, but may foreclose hereon at any time without notice or demand. * * *

Now if the said grantors hereof * * * shall well and truly pay the aforesaid principal sum and interest, taxes, insurance or assessments * * * as above provided, according to the tenor and effect of this instrument, to the said The Prudential Insurance Company of America, its successors or assigns, then the above deed shall be void otherwise the same shall remain in full force and virtue in law."

9. The grantors in said mortgage deed, Henry M. Crites and May R. Crites, have broken its conditions as follows, to-wit:.

10. The installment of interest which became due on December 1, 1931, was not paid, but remains wholly due and unpaid, and delinquent, in the sum of Seven Hundred Fifteen (\$715.00) Dollars, with interest at 8 per cent. from December 1, 1931; the taxes on said real estate were not paid when due and are now delinquent, and said mortgage deed has become and is now absolute; insurance has not been furnished to the petitioner as provided in said mortgage deed.

11. The said mortgage deed was duly executed, witnessed and acknowledged on the 17th day of October, 1929,

before P. J. Robinson, a Notary Public in and for the County of Franklin, State of Ohio, and on the 26th day of October, 1929, at 10:40 A. M. was duly filed for record in the office of the Recorder of Madison County, Ohio, and was thereafter duly recorded in Mortgage Record 73, at page 283. That a photostatic copy of said mortgage deed, together with its accompanying certificates of acknowledgment and recording is attached hereto, filed herewith, by reference made a part hereof, and marked Exhibit "C."

Third Cause of Action.

12. The mortgage deed set up in the Second Cause of Action expressly provides:

"And in the event of non-payment at maturity of the principal of said note or any interest therein named, * * * or on failure to comply with any conditions of this deed, then the rents of the real estate herein described shall immediately accrue to the benefit of the grantee * * * and the occupant or occupants of the within described real estate shall then pay rent to the said grantee, its successors or assigns only * * *."

13. The above described real estate is not being occupied or cultivated by the said defendants, Henry M. Crites and/or May R. Crites; that said real estate is leased or rented or tenanted to and/or by others, all made parties defendant herein; that contrary to the provisions of said mortgage deed, the defendants have not furnished insurance coverage payable to the petitioner herein; that the taxes have been allowed to become and are now delinquent, as alleged in the Second Cause of Action; that the real estate is probably of a value inadequate to secure the petitioner's debt; that heretofore, to-wit, on the 8th day of February, 1932, there was filed in this Court and is now pending herein, a petition in involuntary bankruptcy against the defendant, Henry M. Crites; that the said Henry M. Crites and May R. Crites have conveyed and assigned all of the property, real and personal, of the defendant, Henry M. Crites, to the defendant, Crites, Inc.; that the said defendants, Henry M. Crites and May R. Crites, are insolvent or in imminent danger of insolvency,

and that unless a Receiver is appointed forthwith to take charge of the above described mortgaged premises, the petitioner is in danger of suffering great and irreparable damage, and that this petitioner is without remedy except in this Court of Equity, and except on the appointment of a Receiver to take charge of said premises, to rent and manage the same, collect the proceeds thereof and apply the same to taxes, assessments, and otherwise, as this Honorable Court may direct pending judgment and sale.

14. Petitioner further represents that an emergency exists for a hearing on the application for the appointment of a Receiver, in this to-wit:

15. That in addition to the allegations above, the tenant year in the vicinity of the real estate in question begins on March 1st, and that unless this question is heard and determined the rental of said real estate for the year 1932 will probably be lost, to the irreparable damage of the petitioner.

16. The petitioner expressly adopts, by reference, as a part of its Third Cause of Action, literary paragraphs one (1) to eleven (11) in the foregoing petition.

Rights or Claims of Other Defendants.

17. The defendant, Crites, Inc., claims title to the real estate described in the Second Cause of Action, by virtue of conveyance from the principal defendants herein. The defendant, May R. Crites, is now the wife of Henry M. Crites. The defendants, Crites, Inc., and May R. Crites are made parties hereto on the ground that they, and/or each of them, have or claim to have some right, title or interest in and to the mortgaged premises as purchaser, mortgagee, trustee, judgment creditor, tenant, lessee, attorney-in-fact, assignee, or otherwise, the precise nature of which is unknown to this plaintiff, but such interest, if any there be, has accrued since and is subject junior and inferior to the lien of the petitioner by virtue of its said mortgage deed, and the said named defendants are made parties to this suit to answer to such interest, if any, either collectively or individually which they may have or claim in and to the real estate described in the Second Cause of Action.

IV.

PRAYER FOR RELIEF.

16. In consideration whereof, and for as much as the petitioner and plaintiff is without adequate remedy save and except in a Court of Equity, the said petitioner and plaintiff prays this Honorable Court for judgment against the defendants, Henry M. Crites and May R. Crites, in the principal sum of Thirteen Thousand (\$13,000.00) Dollars, with interest thereon at the rate of $5\frac{1}{2}$ per cent. per annum from December 1, 1931, to the date of filing this petition, and with interest at the rate of 8 per cent. per annum thereafter; and in the further sum of Seven Hundred Fifteen (\$715.00) Dollars, accrued interest, together with interest at 8 per cent. from its maturity, to-wit, December 1, 1931; and on the failure of the defendants to pay the sum found due to this petitioner, by a short day to be fixed by the Court, the petitioner prays that said above described mortgage deed be foreclosed, and that the premises described in the Second Cause of Action, and in Exhibit "C" be ordered appraised, advertised and sold, as an execution by the United States Marshall, and the proceeds of said sale be applied to the judgment to be rendered herein as far as they will go toward paying the same, with a deficiency judgment against the defendants, Henry M. Crites and May R. Crites, for any amount which may be due the petitioner over and above the proceeds of said sale; and that the petitioner may also recover the costs and accruing costs of this suit.

19. And the petitioner further prays that a Receiver be appointed forthwith, on five (5) days notice to the defendants and each of them, under such order as this Honorable Court may make.

20. Petitioner further prays this Honorable Court to issue its writ of subpoena in due form of law and in accordance with the law, procedure, and practice of this Court, directed to the defendants, Henry M. Crites, May R. Crites, Crites, Inc., commanding them on a day certain, to-wit, twenty (20) days from the service of said subpoena, and under a certain penalty to be therein provided, to appear before this Honorable Court to answer all and singular the matters heretofore set forth and complained

of, and to stand by, abide, and perform all of the orders and decrees of this Honorable Court which may be made in this cause.

21. And your petitioner and plaintiff will ever pray.

REMY, HARRISON & REMY,
Indianapolis, Indiana,

INGALLS & SELBY,
Columbus, Ohio,
*Attorneys for Petitioner and Plaintiff,
The Prudential Insurance
Company of America.*

IN THE UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF INDIANA, } ss:
INDIANAPOLIS DIVISION. }

On this 16th day of February, 1932, personally appeared before me, Davis Harrison, who being duly sworn made oath that he is one of the attorneys for the petitioners, The Prudential Insurance Company of America; that said petitioner is a corporation; that affiant is duly authorized to and does make this affidavit for and on behalf of said petitioner; that he knows of his own knowledge that the allegations of said petition are true except in matters stated to be on information and belief, and that as to those matters he is informed that they are and believes them to be true.

DAVIS HARRISON.

Subscribed and sworn to before the undersigned Notary Public in and for the County of Marion, State of Indiana, in the United States of America, Southern District of Indiana, in the Indianapolis division, the day and year above written.

FRANK T. SISSON,
Notary Public.

(SEAL).

My commission expires, Feb. 8, 1933.

The petitions to recover money on note, to foreclose mortgage and for appointment of receiver in Causes Numbers

928, 929, 930, 931, 933, 934, 935, 936, 937 and 947, filed February 17, 1932 are identical with the petition to recover money on note, to foreclose mortgage and for appointment of receiver filed February 17, 1932 in Cause 927, except for the amounts of principal and interest in paragraphs 4, 6, 8, 10 and 18, the description of the Madison County real estate in paragraph 8, and the mortgage record page in paragraph 11 which differences are as follows:

In Cause 928 the principal is \$16,500.00, the interest \$907.50, the mortgage record page 285 and the description as follows: (Omitted by stipulation.)

In Cause 929 the principal is \$17,000.00 the interest \$935.00, the mortgage record page 292 and the description as follows: (Omitted by stipulation.)

In Cause 930 the principal is \$13,500.00 the interest \$742.50, the mortgage record page 281 and the description as follows: (Omitted by stipulation.)

In Cause 931 the principal is \$21,000.00, the interest \$7,155.00, the mortgage record page 299 and the description as follows: (Omitted by stipulation.)

In Cause 933 the principal is \$8,000.00, the interest \$440.00, the mortgage record page 293 and the description as follows: (Omitted by stipulation.)

In Cause 934 the principal is \$25,000.00, the interest \$1,375.00, the mortgage record page 297 and the description as follows: (Omitted by stipulation.)

In Cause 935 the principal is \$42,000.00, the interest \$2,310.00, the mortgage record page 287 and the description as follows: (Omitted by stipulation.)

In Cause 936 the principal is \$13,500.00, the interest \$742.50, the mortgage record page 291 and the description as follows: (Omitted by stipulation.)

In Cause 937 the principal is \$11,000.00, the interest \$605.00, the mortgage record page 301 and the description as follows: (Omitted by stipulation.)

In Cause 947 the principal is \$11,500.00, the interest \$632.50, the mortgage record page 289 and the description as follows: (Omitted by stipulation.)

ORDER APPOINTING RECEIVER.

(Entered February 17, 1932.)

This day this cause came on to be heard upon the petition and verified application of the petitioner for the appointment of a receiver, and it appearing to the Court that due notice has been given to the defendant, Crites, Inc., the alleged owner of the premises and the person claiming the right to possession, the same is submitted to the Court for trial, finding and decree and the Court, being duly advised, in the premises, does find that it has jurisdiction of the subject matter and of the defendant, Crites, Inc.

And now on hearing had and upon evidence submitted, the Court being duly advised, finds for the petitioner on its application for the appointment of a receiver and that a receiver should be appointed.

It is now, therefore, ordered, adjudged and decreed that Richard Simkins and George Florence be and they are hereby appointed co-receivers herein to collect the rents and proceeds of the real estate described in the second cause of action in plaintiff's petition herein and/or to operate and manage said real estate through tenants, lessées, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the Court.

The Court now orders the co-receivers, before entering the performance of their duties, to file in this Court their bond to cover this and twenty-one co-related cases, all numbered on the dockets of this Court, No. 927 to 948, both inclusive, in the sum of \$10,000.00, conditioned upon the faithful performance of their respective duties as co-receivers herein, and in the twenty-one other co-related cases, as aforesaid, with surety satisfactory to the Clerk of this Court.

And the said Richard Simkins and George Florence now appear in open Court and file herein bond, with sureties approved by the Clerk of this Court, and now separately

and severally take oath, qualify and enter upon the performance of their respective duties as co-receivers herein.

This cause continued for further order of this Court.

/s/ BENSON W. HOUGH
United States District Judge.

The orders appointing receivers entered February 17, 1937 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

ORDER.

(Entered March 3, 1932.)

This day this cause came on to be heard upon the Application of the Receiver herein for instructions relative to the borrowing of money from The Prudential Insurance Company of America, Petitioner herein, for the payment of certain items of taxes, insurance premiums and other miscellaneous expenses, and it appearing to the Court that the Receivers have no funds in their possession with which to pay any of the expenses of preservation of this Estate, and that it is absolutely necessary that certain items of taxes, insurance premiums and expenses be paid forthwith, in order to prevent the accrual of penalties on taxes and possible irreparable losses of uninsured buildings, and for the payment of certain other expenses of preservation of the Estate; and that The Prudential Insurance Company of America, Petitioner herein, in order to more fully protect its security on its first mortgage lien, is ready and willing to advance funds for the use of the Receivers herein, but only with the authority and direction of the Court to the Receivers,

Now, Therefore, it is ordered that the Receivers be, and they are hereby expressly authorized and directed:

(1) To borrow from The Prudential Insurance Company of America, Petitioner herein, the sums necessary to pay the accrued taxes against the premises involved in this proceeding, in the amount of \$180.19 and that the said, The Prudential Insurance Company of America shall be subrogated to the rights of the taxing authorities, so paid as a lien claimant, for the amount so advanced for taxes, the amount so advanced to be repaid to the Petitioner herein as a first lien prior to the payment of all mortgage claims, upon distribution of the proceeds arising from the sale of the premises herein.

(2) That the Receivers are authorized and expressly directed to borrow from The Prudential Insurance Company of America, Petitioner herein, a sum sufficient to pay the insurance premiums for the insuring of the buildings on the premises referred to in this proceeding, against loss by fire or tornado, and that the said The Prudential Insurance Company of America shall be subrogated to the rights of the first mortgage lien claimant for the amount of money so advanced for insurance premiums to be paid first out of the proceeds of the sale of the premises herein after the payment of moneys advanced for tax claims and expenses.

(3) The Receivers herein are expressly authorized and directed to borrow from The Prudential Insurance Company of America, Petitioner herein, such an amount of money or moneys as in the opinion of the Receivers is necessary for the cultivation and preservation of the premises involved herein, pending the final determination of this foreclosure proceeding, including funds necessary to purchase seed, fertilizer, and essential repairs and to employ the necessary labor to cultivate and operate the farms; and that the said The Prudential Insurance Company of America, Petitioner herein, shall be reimbursed by the Receivers out of the proceeds arising from the sale of any property or assets herein for such necessary expenses and advancements to the Receivers prior to the disbursement of any funds to mortgage lien claimants.

And this cause came on further to be heard upon the Receivers' Application for the appointment of counsel

herein, and it appearing to the Court that the numerous controversies herein will require the aid and assistance of counsel for the Receivers, it is hereby ordered that Remy, Harrison and Remy and Ingalls and Selby be appointed counsel for the Receivers herein.

/s/ HOUGH
Judge

The orders upon the application of the Receivers for instructions relative to the borrowing of money from the Prudential Insurance Company of America entered March 3, 1932 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order entered in Cause No. 927 except as to the amount authorized to be borrowed in Paragraph (1) which amounts in the respective causes are as follows:

928.....	\$280.81
929.....	276.78
930.....	205.53
931.....	350.66
933.....	127.51
934.....	345.07
935.....	572.31
936.....	175.13
937.....	160.44
947.....	194.77

ORDER.

(Entered March 5, 1932.)

This day came on to be heard the Receivers' Supplemental Application and Petition for authority to borrow

money for the payment of certain items of miscellaneous expense in the management of the mortgaged premises for which the Receivers have heretofore been appointed, and it appearing to the Court that it has been impossible for the Receivers to borrow the money for said miscellaneous expenses pursuant to the former Order hereinbefore made. And it further appearing that The City National Bank and Trust Company, Columbus, Ohio, has agreed to lend to the Receivers herein a sum not to exceed Seventy-five hundred Dollars (\$7500.00) to be expended by the Receivers for said miscellaneous expenses, said loan to be evidenced by Receivers' Certificates, if authorized by this Court, and providing that the Petitioner, The Prudential Insurance Company of America, consent to waive priority of its respective mortgages in favor of said Receivers' Certificates to said extent of Seventy-five hundred dollars (\$7500.00).

Now, Therefore, it is ordered, pursuant to the prayer of the Receivers' Supplemental Petition for authority and instructions, that said Receivers be, and they are hereby expressly authorized, empowered and directed to borrow from the City National Bank and Trust Company of Columbus, Ohio, the sum of Seventy-five hundred Dollars (\$7500.00), and to execute and deliver to said Bank, as evidence of said loan, their Receivers' Certificates in due form of law; as per copy thereof, attached hereto, filed herewith, by reference made a part hereof, and marked Exhibit "A", said Receiver's Certificates, when executed, to be approved by this Court, and in said sum, to be by said Receivers apportioned among Equity causes, Nos. 927-948; and,

It is further ordered that on approval of this Order by counsel for the Petitioner, said Order so approved shall be sufficient waiver by said Petitioner of its several mortgage liens as set up in said several causes in favor, but only in favor of said Receivers' Certificates to the extent of said aggregate sum of Seventy-five hundred Dollars (\$7500.00), and on the execution of said Receivers' Certificates, upon approval of this Order by counsel for Petitioner, the said Receivers' Certificates shall operate as and become first liens on the proceeds of the Receivership herein, subject only to the costs of administration to

the extent of said authorized issue of Seventy-five hundred Dollars (\$7500.00) and shall be paid in the order of their priority, and,

It is further ordered that said Waiver by the Petitioner shall operate only and solely with respect to said Receivers' Certificates herein authorized.

/s/ HUGH
Judge

Approved

THE PRUDENTIAL INSURANCE CO. OF AMERICA

by DAVIS HARRISON

Counsel.

REMY, HARRISON & REMY,

and

INGALLS & SELBY,

By P. SELBY

Attorneys for Receivers.

EXHIBIT "A".

RECEIVERS' CERTIFICATE

AUTHORIZED ISSUE \$7500.00

No.

This is to certify that for value received Richard Simkins and George Florence, as co-receivers of certain farm lands of H. M. Crites, under appointment by the District Court of the United States in and for the Southern District of Ohio, Eastern Division, in Equity Proceedings Nos. 927 to 948 inclusive, and not individually, are indebted to the bearers hereof in the sum of \$..... payable at the office of The City National Bank and Trust Company in the City of Columbus, Ohio, on demand and after date hereof, in gold coin of the United States of America of the present standard of weight and fineness, with interest thereon at the rate of..... per cent (....%) per annum, payable semi-annually, in gold coin, on the

..... day of and
upon presentation of this certificate for endorsement there-
on of the interest payment.

This certificate is part of an issue of certificates of like amounts, tenor and date, not exceeding in the aggregate the principal sum of Seventy-five hundred Dollars (\$7500.00) authorized by an Order of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit therein pending, in which The Prudential Insurance Company of America is Petitioner, and H. M. Crites, et al., are defendants.

This Certificate is issued pursuant to, and is entitled to the benefits and security specified in the aforesaid Order, subject to all the terms and provisions whereof this certificate is issued and held. This certificate, and all rights and liens thereunder shall be transferable by delivery.

In witness whereof the said Receivers have, pursuant to the Order of the Court hereinbefore recited, hereunto subscribed their names this day of 1932.

.....
.....
Receivers of H. M. Crites, etc.

Examined, authorized and approved.

.....
Judge.

The orders entered March 5, 1932 on the Receivers' supplemental application and petition for authority to borrow money in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

ORDER.

(Entered March 18, 1932)

This cause came on to be heard upon the application of George Florence and Richard Simkins, Receivers of the farm premises of H. M. Crites, involved in this proceeding and in the 21 co-related equity causes in this Court, numbered 927-948 inclusive, for authority to enter into written lease agreements on the farms involved in said proceedings, and said Receivers' application was submitted to the Court on the evidence and statement and by agreement of counsel for all of the parties to this proceeding, and it appearing to the Court from the evidence and from the statements of counsel that tenants of H. M. Crites are still occupying certain parcels of said real estate, and it further appearing that Crites, Inc., purporting to represent the interests of H. M. Crites and of his unsecured creditors, has offered and agreed to remove the burdensome personal property, consisting of stored grain and the live stock located on the respective parcels, and has further offered and agreed to permit the farm equipment and machinery now on said premises to remain thereon for use by the tenants during the period of the leases to be executed by the Receivers, and it further appearing to the Court that it would be for the best interest of the mortgagee and all of the parties involved in this proceeding to enter into such written lease agreements for the farm year beginning March 1st, 1932.

It is, therefore, found and considered by the Court that the Receivers should be authorized to enter into such leases, and

It is, therefore, ordered that George Florence and Richard Simkins, Receivers as aforesaid, be and they are hereby authorized and expressly directed to enter into written lease agreements, insofar as it may seem advisable and practicable in the opinion of the Receivers, with the former tenants of H. M. Crites, now occupying the premises with the understanding and agreement, evidenced by the approval of this entry, by the other parties in interest, and particularly Crites, Inc., to permit the farm machinery and equipment to remain on said farms and be used by the said tenants, without charge to the Receivers

or to the said tenants, the farm lease to contain the usual terms, covenants and conditions of farm leases in Ohio on a fifty per cent. share or crop rental basis. In the event that, in the opinion of the Receivers, it is impossible or impracticable to rent to persons now occupying any of said parcels of real estate, the Receivers are hereby authorized and expressly directed to negotiate for and enter into farm leases with other tenants who, in the opinion of the Receivers, would be satisfactory tenants for the ensuing year, subject to the same agreement as above outlined, by Crites, Inc., as to the farm equipment and machinery.

/s/ HOUGH,
United States District Judge.

Approved

REMY, HARRISON & REMY

&

INGALLS & SELBY,

Attys for Receivers.

ARNOLD, WRIGHT, PURPUS & HARLOR,

NATHAN HAFFENBERG for

Crites, Incorporated.

KENNETH B. JOHNSTON,

Atty for The Mid-State Realty Co.

T. J. ABERNATHY and J. N. LINTON,

Attys for H. M. Crites.

The orders entered March 18, 1932 upon the application of the receivers for authority to enter into written lease agreements in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

ORDER ON RECEIVERS' PETITION FOR INSTRUCTIONS.

(Entered October 2, 1933)

Come now the receivers herein, having heretofore filed their petition for instructions, and the Court having examined the same, being duly advised in the premises, finds that the prayer of said petition should be granted;

And it is, therefore, ordered that Richard Simkins and George S. Florence, co-receivers herein, as such receivers be and they are hereby ordered and hereby authorized and directed to sell to the plaintiff said receivers' interest in the growing corn crop on the premises covered by the plaintiff's mortgage at and for the price of \$490.00, and to credit on the purchase price the unpaid balance due to the plaintiff on account of advancements heretofore made to the receivers by the plaintiff; and said receivers are hereby ordered to make due report of their proceedings hereunder in their final report as such receivers.

/s/ Hough,
Judge.

The orders entered October 2, 1933 on the petition of the receivers for instructions in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order entered in Cause No. 927 except for the price, which prices are as follows in the respective causes:

928.....	\$ 183.75
929.....	1,225.00
930.....	490.00
931.....	1,102.50
933.....	315.00
934.....	787.50
935.....	2,084.95
936.....	590.45
937.....	420.00
947.....	79.45

ORDER.

(Entered January 17, 1933)

This day this cause came on to be heard on the Application of the Receivers for partial allowance on account for services rendered by the Receivers and their counsel.

Upon consideration the Court finds said Application well taken, and it is hereby ordered that the Receivers shall be and are hereby authorized to pay to themselves and to their counsel the sum of \$250.00 each on account for such services.

/s/ Hough,
Judge

The orders entered January 17, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 on the application of the receivers for partial allowance on account for services are identical with the foregoing order in Cause No. 927.

ORDER.

(Entered March 22, 1939)

This 22 day of March, 1939, this cause coming to be heard upon the application of the Receivers herein for authority to remove from the custody of the Clerk of the United States District Court twenty-two account books and cancelled checks for the purpose of permitting the Receivers to further amend their first accounts, in accordance with the findings of the Master Commissioner heretofore appointed, and also for an order authorizing the Receivers to pay premiums upon the surety bonds of the Receivers for a period, and it appearing to the Court that

it is necessary for a revision of the Receivers' accounts in accordance with the Master's direction, and that it appears necessary for the Receivers to withdraw from the Clerk of the United States District Court the account books and the cancelled checks for the purpose of having an accountant make the necessary amendments, the Court orders and directs the Clerk of the United States District Court to surrender to Receivers twenty-two account books and cancelled checks now in the custody of the Clerk of the United States District Court, and authorizes the Clerk to accept the receipt of O. C. Ingalls, counsel for the Receivers, for said receipt books and cancelled checks and permit the Receivers to keep these books and cancelled checks in their possession for a period of ten days from the filing of this order.

The Court further orders and directs the Receivers to pay to the Globe Indemnity Company the sum of \$100.00, being the premiums for two years upon the surety bonds of the Receivers.

UNDERWOOD,
Judge.

Approved:

O. C. Ingalls, attorney for Receivers received 25 account books as per this order 3/23/39—checks received.

O. C. INGALLS,
Attorney for Receivers.

The orders entered March 22, 1939 on the application of the receivers for authority to remove account books and canceled checks in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

ENTRY MAKING PARTY DEFENDANT.

(Entered March 18, 1932)

This cause came on to be heard upon the motion of the petitioner herein to make The Mid-State Realty Company, an Ohio corporation, party defendant herein, and it appearing to the Court that said Mid-State Realty Company has or claims to have an interest in the subject matter of this controversy and, in the premises involved in the foreclosure proceeding, it is ordered that said The Mid-State Realty Company be and it is hereby made party defendant herein with leave to plead instant or prior to April 19, 1932.

/s/ HOUGH,
United States District Judge.

The orders entered March 18, 1932 on the motion of the petitioner to make The Mid-State Realty Company party defendant in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order.

APPLICATION.

(Filed January 17, 1933)

Now comes Richard Simkins and George Florence the duly appointed, qualified and acting Receivers in the above entitled Equity proceedings, and respectfully apply to the Court for an allowance on account of services rendered by the Receivers and the Receivers' Attorneys in the administration of the above entitled causes, and in support of said Application state that the Receivers and their Attorneys have been active and diligent in the administra-

tion of the farm lands involved in these twenty-one equity foreclosure proceedings and have operated the farms for a period of approximately one year; that no previous Application for allowance of compensation has been made, and they further state that this request for compensation is for partial allowance on account for services heretofore rendered, and your Receivers suggest an allowance of \$250.00 each on account at this time.

/s/ RICHARD SIMKINS

/s/ GEORGE FLORENCE

STATE OF OHIO, FRANKLIN COUNTY, ss:

Richard Simkins, being first duly sworn, states that he is one of the co-receivers in the above captioned and numbered equity proceedings herein, and that the facts stated and allegations contained in the foregoing Application are true as he verily believes.

/s/ RICHARD SIMKINS

Sworn to and subscribed in my presence this 14th day of Jan., 1933.

/s/ GERTRUDE HAMILTON,
Notary Public, Franklin
County, Ohio.

GERTRUDE HAMILTON,
Notary Public, Franklin County, Ohio.

My Commission Expires Sept. 23, 1933.

The application of Richard Simkins and George Florence filed January 17, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing application filed in Cause No. 927.

DECREE PRO CONFESSO.

(Entered May 2, 1933)

This cause came on for hearing on the motion of The Prudential Insurance Company of America, plaintiff in the above entitled cause, for a final decree pro confesso, pursuant to Equity Rule 17, and it appearing to the Court that the bill in equity in the above cause was filed in this Court on the 17th day of February, 1932, and that a subpoena was duly served on each of the defendants on the 24 day of February, 1932; that the time for said defendants to appear and answer was by order of court extended to April 20, 1932, and that the Midstate Realty Company was, on motion, made a party defendant herein and ruled to answer or demur on or before April 19, 1932; and that no answer or other defense has been filed, by any of said defendants and that an order taking the bill as confessed was entered in the Order Book, on the 22 day of March, 1933, in the office of the Clerk of this Court, and that no proceedings have been taken by the said defendants since said order was entered, and that more than 30 days after the entry of said order to take said bill pro confesso have elapsed, it is therefore ordered, adjudged and decreed that said order pro confesso be deemed absolute.

The Court finds that the note and mortgage set forth in the bill were executed, as alleged; that the parties defendant defaulted and breached the conditions of said note and mortgage, as alleged, by failure to pay the instalment of interest which became due on the 1st day of December, 1931, and that by virtue of the acceleration of maturity clause, the entire principal balance thereon became immediately due and owing, and that there is due to the plaintiff from the defendants, Henry M. Crites and May Reber Crites, the sum of \$13,000.00, principal, together with interest accrued on the 1st day of December, 1931, in the sum of \$715.00, or a total of \$13,715.00, together with interest thereon at the rate of 8 per cent. per annum from the date of default to this date, all in the total sum of \$15199.23; and the Court further finds that said indebtedness is secured by a first mortgage lien on the real estate described in the bill.

It is, therefore, ordered, adjudged and decreed that unless the defendants, Henry M. Crites and May Reber Crites, or someone for them or on their behalf, shall pay to the plaintiff said sum of \$15199.23, with interest thereon at the rate of 8 per cent. per annum, within 5 days from this date, together with the costs of this suit, the plaintiff's mortgage shall be foreclosed together with the equity of redemption of all parties defendant in and to said real estate, and that the United States Marshall on said failure to pay shall cause the mortgaged real estate to be appraised as by the statutes of the State of Ohio approved, and that the said United States Marshall shall then proceed to sell the real estate in the bill described on Saturday, July 1, 1933, at public sale at the door of the court house in the town of London, Madison County, Ohio, for cash on the date of sale, at not less than $\frac{2}{3}$ of the appraised value, having given 6 weeks notice of the time, terms and place of said sale by publication of notice for 6 successive weeks in the Madison Press, a newspaper printed, issued and of general circulation in the county in which the mortgaged real estate is situated, the first of said publications to be more than 30 days prior to the date of sale and publication to be made on the same day in each week, sale to be made subject to the confirmation of this Court.

It is further ordered, adjudged and decreed that the United States Marshall make due return of his proceedings hereunder, make full report of the execution of this decree and order of sale and bring into Court his deed for confirmation, together with any surplus funds which may arise from said sale or if a deficiency remain after applying the proceeds of said sale, the said United States Marshall shall report said deficiency and on fixing said deficiency, if any, plaintiff shall be entitled to execution on said deficiency judgment, if any there be.

All of which is ordered, adjudged and decreed. And this cause is now continued.

/s/ HOUGH,
Judge District Court.

The decrees pro confesso entered May 2, 1933 in Cause Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing decree in Cause No. 927 except for the amounts of principal, the amounts of interest accrued on the 1st day of December 1931, the total thereof, and the amounts of the judgment, which are as follows in the respective causes:

	Principal	Interest	Total	Judgment
928	\$16,500	\$ 907.50	\$17,407.50	\$19,484.06
929	17,000	935.00	17,935.00	19,971.59
930	13,500	742.50	14,242.50	15,784.57
931	21,000	1,155.00	22,155.00	24,553.88
933	8,500	440.00	8,940.00	9,353.90
934	25,000	1,375.00	26,375.00	29,229.46
935	42,000	2,310.00	44,310.00	49,105.43
936	13,500	742.50	14,242.50	15,784.57
937	11,000	605.00	11,605.00	11,829.52
947	11,500	632.50	12,132.50	13,446.11

APPRAISEMENTS.

(Filed May 17, 1933)

The amounts of the valuations in the appraisers' appraisements filed May 17, 1933 in Causes Nos. 927, 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are as follows:

In Cause 927.....	\$16,780.00
In Cause 928.....	19,400.00
In Cause 929.....	22,900.00
In Cause 930.....	14,350.00
In Cause 931.....	32,500.00
In Cause 933.....	9,250.00
In Cause 934.....	34,500.00
In Cause 935.....	49,750.00
In Cause 936.....	14,650.00
In Cause 937.....	16,200.00
In Cause 947.....	13,800.00

ORDER.

(Entered July 5, 1933)

The Prudential Insurance Company of America, the purchaser of the real estate involved in this proceeding, being also the mortgagee, and having bid for said premises a sum not exceeding its mortgage lien, is therefore not required to pay into court any sum of money except a sufficient amount to release the tax liens on said real estate and the costs in this proceeding.

/s/ Hough,
Judge.

The orders entered July 5, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

ORDER.

(Entered July 13, 1933)

Come now George S. Florence and Richard Simkins, co-receivers herein, and move the Court to amend the former order, made herein on March 3rd, 1932, on the receiver's petition for authority to borrow money for the payment of taxes,

Now, said motion having been considered by the Court, the Court does find that said motion should be, and the same is hereby granted.

Now, therefore, it is ordered, that said former order, to-wit: order of March 3rd, 1932, be modified in this, to-wit: that the receivers be authorized to borrow the sum of \$656.52, from The Prudential Insurance Company of

America, for the purpose of paying accrued taxes, and said order shall be, and the same is hereby affirmed in all other respects.

And it is further ordered, that The Prudential Insurance Company of America be subrogated to the lien of the State for the taxes so advanced.

/s/ HUGH,
Judge, S.D.O.

The orders entered July 13, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927 except as to the amount authorized to be borrowed, which amount is as follows in the respective causes:

928	892.67
929	1,028.42
930	800.18
931	1,274.36
933	417.85
934	1,392.57
935	2,114.78
936	640.30
937	622.79
947	655.70

NOTICE OF MOTION.

(Filed July 15, 1933).

To: Crites, Inc.

Please take notice that a motion will be made in the above entitled cause at a term of the District Court of the United States within and for the Eastern Division

of the Southern District of Ohio, to be held in the Federal Building in the City of Columbus, Ohio, on the 18 day of July, 1933, at 9:30 o'clock, in the forenoon of that day, or as soon thereafter as counsel may be heard for an order confirming the sale herein by Paul H. Cresswell, the United States Marshal, made on the 1st day of July, 1933, to The Prudential Insurance Company of America, pursuant to the decree of said sale as made by the United States Marshal, which report was filed herein on the day of July, 1933, and for such other and further relief as to the said court may seem proper,

/s/ DAVIS HARRISON,

/s/ INGALLS & SELBY,

Attorneys for Plaintiff.

Service accepted this 14th day of July, 1933.

ARNOLD, WRIGHT, PURPUS & HARLOR,

Attorneys for Crites, Inc.

The notices to Crites, Inc. and its acknowledgment of service filed July 15, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing notice and acknowledgment of service in Cause No. 927.

MOTION OF PLAINTIFF TO CONFIRM SALE.

(Filed July 18, 1933)

Comes Now The Prudential Insurance Company of America, plaintiff in the above entitled cause, and moves the Court the sale of the property of the defendants there-

in made by Paul H. Cresswell, United States Marshal, in pursuance of the decree and judgment rendered in this cause on the 2nd day of May, 1933, together with the return and the report of the United States Marshal of his proceedings in connection with said sale, filed herein on the 18 day of July, 1933, to be approved and confirmed.

/s/ DAVIS HARRISON,
Attorney for Plaintiff.

The plaintiff's motions to confirm sale filed July 18, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing motion of plaintiff to confirm sale in Cause No. 927.

ENTRY.

(Entered July 18, 1933)

This day this cause came on to be heard on the motion of the plaintiff and on its producing the return of the United States Marshal to the order of sale of the real estate described in the petition.

Whereupon the Court, on careful examination of the proceedings of the United States Marshal, finds that the former orders of this Court, as to the appraisement of said real estate and the advertisement of sale, have been complied with within every respect, and finds that the proceedings of the United States Marshal have in all respects conformed to the statutes made and provided in such cases, and to the former orders of the Court.

The Court further finds that after the distribution of the proceeds of said sale, there remains due to the plain-

tiff from the defendants, Henry M. Crites and May R. Crites, the sum of \$4254.57.

It is, therefore, ordered by the Court that the proceedings and sale be, and they are hereby approved and confirmed; and it is further ordered that the United States Marshal convey to the purchaser, The Prudential Insurance Company of America, by his deed, according to law, the property so sold; and the said purchaser is hereby subrogated to all the rights of any lien-holders in and to the said premises, so far as they may be paid herein for the protection of its title; and the right of possession is awarded to put said purchaser in full possession of said premises.

And the United States Marshal now produces in open court his deed conveying to the purchaser, The Prudential Insurance Company of America; and the said Marshal's deed is now in open court approved and ordered delivered.

And the Court coming now to distribute the proceeds of said sale in the sum of \$11,200.00, it is ordered that the United States Marshal, out of the money in his hands, pay:

1. The costs in this action, taxed at \$75.40;
2. To plaintiff, The Prudential Insurance Company of America, the balance of said funds,

It is further ordered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendants, Henry M. Crites and May R. Crites, the sum of \$4254.57; and execution is awarded therefor.

/s/ Hough,
Judge.

The orders of confirmation and distribution entered July 18, 1933 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order of confirmation and distribution entered in Cause No. 27 except as to the amounts of the proceeds of the

sales, the amounts of the costs taxed and the amounts of deficiency decreed which are as follows in the respective causes:

	Amount of Proceeds of Sales	Amount of Costs Taxed	Amount of Deficiency Decreed
928	\$13,000.00	81.79	6811.39
929	15,300.00	73.91	5007.11
930	9,600.00	60.79	6449.75
931	22,000.00	59.05	2966.38
933	6,200.00	52.05	3311.04
934	23,100.00	73.05	6620.51
935	33,500.00	65.50	16430.40
936	9,800.00	53.80	6249.75
937	10,900.00	54.67	2145.05
947	9,300.00	68.43	4372.00

MARSHAL'S RETURNS

(Filed July 18, 1933)

In the Marshall's returns filed July 18, 1933, in each of the following causes, the dates of the sales were July 1, 1933; the purchasers' names were The Prudential Insurance Company of America; and the sales prices were:

In Cause 927,	\$11,200.00
In Cause 928,	13,000.00
In Cause 929,	15,300.00
In Cause 930,	9,600.00
In Cause 931,	22,000.00
In Cause 933,	6,200.00
In Cause 934,	23,100.00
In Cause 935,	33,500.00
In Cause 936,	9,800.00
In Cause 937,	10,900.00
In Cause 947,	9,300.00

**APPLICATION OF O. C. INGALLS, ONE OF THE
ATTORNEYS FOR RECEIVERS, FOR
COMPENSATION.**

(Filed February 19, 1937)

Now comes O. C. Ingalls, one of the attorneys for the receivers, and respectfully represents to the Court that in accordance with the statement of time rendered in this estate, which is attached hereto, he and his office has served this trust diligently.

In the early part of the receivership, both the applicant and Paul L. Selby devoted a great deal of time and the number of hours that each party devoted to this work has not been recorded in the itemization of time spent. It is safe to say that at least fifty more hours could be added to the day by day statement.

Your applicant has not entered all the time he has spent since 1933, trying to get the matter before the court. The court will recall that several times this applicant came over to the Court and asked the court to do something to force the matter to an issue and to compel the filing of the final account.

Your applicant has been paid \$250.00 on account. Counsel are usually paid upon the basis of the size of the estate, the nature of the work and the results accomplished and the amount of money handled by the receivers. This was a complicated estate appraised at nearly half a million dollars, with debts of \$405,000 against it. It was sold to the Prudential Insurance Company, no one else having a chance, for \$308,000, plus, and the Prudential Insurance Company a few months thereafter sold all the farms for an amount which enabled them to get approximately \$200,000 profit, so The Prudential Insurance Company should not be permitted to complain concerning fees asked and they should be compelled to pay in to this estate additional sums of money so that a fee commensurate with the services rendered could be asked by both counsel and the receivers.

The Receivers handled \$64,761.00 in the management of this estate, and the court should bear in mind that this was handled during the year 1932 and 1933, when all of

the corn that was sold during 1932 brought from 14¢ to 20¢ per bushel, oats from 14¢ to 19¢ and wheat 37¢ per bushel. The same amount of farm products handled today would have brought over \$200,000, so the Court can see that the receivers were not overpaid for their services.

The Court should bear in mind that this is not one case but twenty-two cases; that it was necessary to prepare in these matters twenty-two applications and orders and the court will see that the fee asked for these services is less than \$65.00 per case.

Of this total 458 hours, 20 hours were actually spent in Court. At \$5.00 per hour for the time spent the reasonable charge would be \$2200 to \$2400. Of course, the time spent in court should be double the time spent outside, but in view of the size of the estate your applicant is asking that he be allowed the sum of \$1200.00 and his expenses in the sum of \$68.75, as per statement attached hereto.

Wherefore, your appellant asks that he may be allowed the sum of \$1200.00 for services rendered herein and his expenses in the sum of \$68.75.

O. C. INGALLS.

State of Ohio
County of Franklin, SS:

O. C. Ingalls, being first duly sworn, states that he is one of the attorneys for the receivers herein; that the statement attached hereto are true statements of services performed in this estate, and that no agreement has been made, directly or indirectly and that no understanding exists for a division of fees with the attorneys for the petitioning creditors, receivers, trustee, or attorneys for any of them.

R. INGALLS.

Sworn to before me and subscribed in my presence this 19th day of February, 1937.

RUTH WORKMAN,
Notary Public,
Franklin County, Ohio.

STATEMENT OF ACCOUNT OF INGALLS
& SELBY

In Re: Crites Receivership.

1932

- Feb. 15 & 16th—Preparation of 22 petitions, 4 copies each with precipes, for foreclosure and appointment of receivers and the preparation of 22 orders appointing the receivers 12 hours
- Feb. 17—Conference between Florence, Simpkins, Harrison, O. C. Ingalls and Paul Selby in the office of Ingalls and Selby—Appearance before Judge Hough and the seeking of the appointment of George Florence and Richard Simpkins as receivers, arrangement being necessary for the execution of a bond and the bond was signed in office of Ingalls & Selby 6 hours
- Feb. 18—Conferences with Florence & Simpkins in Columbus and trip to London by O. C. Ingalls in P. M. (50 miles). Conference with T. J. Abernathy re foreclosure matter answer 8 hours
-
- Feb. 22—Telephone call from Simpkins, asking for additional fees to be drawn—preparation of additional pleadings—Letter to Davis Harrison, advising that he had over-looked joining the Mid State Realty Company as party defendant. Meeting with officers of Crites, Inc. 4 hours
-

1933

- Mar. 22—Filing orders Pro confesso. Filling in dates and names of Notary on the originals and copies 6 hours
-
- May 2—Filing 22 motions for decree Pro confesso. Conference with Simpkins and Florence and Ingalls & Selby at Federal Court..... 6 hours
-

1933

May 4 to May 8th—Conferences with U. S. Marshall to get the date of sale changed and to get the appraisal made. The Marshall insisted upon having a deposit made in each case before he would go forward with the order of sale and it was necessary to telephone to Indianapolis several times and to Circleville in order to get the matter straightened out. In all these four days, counsel for Receiver spent.....24 hours

July 7—22 entries drawn as to privilege of Prudential Insurance Company to purchase without paying cash, and having the same approved 6 hours

July 18—Confirmation of sale in Madison and Pickaway Counties 3 hours

July 25—Conference at Circleville with receivers; in re bringing an action against H. M. Crites for deficiency judgment (52 Miles) 6 hours

1934

On April 19th final account was purported to have been filed and turned over to Judge Hough. It was reported that these final accounts had been turned over to the Prudential Insurance Company of America for checking and that they had not been returned. In October, 1935, thinking that the Prudential Insurance Company had had these accounts a sufficient length of time, O. C. Ingalls wrote Davis Harrison at Indianapolis, asking to have the matter adjusted and the estate closed. Nothing was done until September 24th, 1936, at which time, as counsel for the receivers and at their suggestion, counsel filed an application to compel the Prudential Insurance Company of America to show cause why it should not be punished for contempt for holding the final account of the receivers

and I notified Mr. Harrison at that time that I was going to press that motion, unless the accounts were returned. Mr. Harrison stated in a letter to O. C. Ingalls, that rather than have exceptions filed to the final report Judge Hough preferred that the Prudential go over the accounts and see if there was anything objectional. He says in his letter of September 30th—

“There are some items which are not acceptable, and if you feel that that is the best way to handle it, I shall see that the reports are returned to the receivers at once so that they may be filed and exceptions filed to the same.”

I replied on September 24th that I had discussed this with the receivers and it was perfectly proper for him to file his exceptions, if he would only file the final accounts. On December 11th Mr. Harrison wrote me as follows:

“I have been unavoidably delayed in answering your letters and in forwarding the receivers report in this case. I shall know definitely within the next two or three days and shall withhold forwarding the reports until the Prudential has reached a final decision, unless, of course, there is some reason to forward them by return mail and if there is, of course, I shall be glad to comply with your wishes.”

I wrote Mr. Harrison on December 31st, advising him that it had been nearly three weeks since he promised some action, and nothing had been done. I have the following letter from Mr. Harrison dated January 4th, 1937:

“There seems to be some misunderstanding somewhere along the line about the report of the receivers. As far as I know the only thing which we have is a copy of the report in each case. If the originals were ever removed by the Prudential it was without my knowledge. Please investigate and advise me.”

Therefore, upon receipt of this letter, it became necessary to have new copies made of the receivers' final account and this attorney has made three trips to Circleville during the months of December and January in an effort to get these matters closed and have just recently succeeded in getting final accounts made up. (Total mileage 156 miles.)

The above is the daily recapitulation of the activity of the office of Ingalls and Selby, as attorneys for the receivers. Often times, particularly in the early part of this receivership, both Mr. Ingalls and Mr. Selby worked on these matters and in a good many instances the time spent is the time of both of these men.

The total appraised value of the assets which were handled in this matter is \$442,890.00; total mortgages against said property amount to \$405,000; total number of acres were 7,956.60. The time spent was almost continuous from February 17, 1932, through until about April 1933, after which date the foregoing statement shows the time spent. The farms were sold at public auction to the Prudential Insurance Company for \$308,000, on the 1st day of July, 1933, and within a few months after the sale the Prudential sold these farms for \$....., showing a tremendous profit to the Prudential Insurance Company. The tremendous size of these farms and the fact that the Prudential Insurance Company did insist upon buying all of them, kept away a great many bidders who were interested in buying these farms.

/s/ O. C. INGALLS.

Total Number of Hours Spent.....458 hours.

**FIRST AND FINAL ACCOUNT OF
GEORGE FLORENCE AND RICHARD SIMKINS,
RECEIVERS.**

(Filed February 19, 1937)

Said Receivers Charge Themselves As Follows:

1932

927

March 5

By amount of loan from the City
National Bank of Columbus,
Ohio on Receivers' Certificate.... \$ 250.00

1932

April 22	By advance as per Journal Entry from The Prudential Insurance Company of America for insurance on buildings.....	13.00
August 8	By sale of wheat as follows: 1017 bu 10# @ 37¢ by sale of oats as follows: 1781 bu. 28# @ 14¢ Receivers' 1/2.....	312.90
September 14	By sale of straw	8.46

1933

January 7	By sale of corn 527 bu. 20# @ 20¢	105.46
July 15	By advancement as per order of Court for payment of taxes.....	656.52
August 4	By refund for expense transfer- ring deed13
August 4	By refund for expenses recording deed	1.90
August 4	By refund for U. S. Revenue stamps for deed.....	11.50
August 18	By sale of oats as follows: 1/2 of 454 bu. 2# @ 35¢ 1/2 of 675 bu. 20# @ 35¢.....	190.93
August 26	By sale of straw 60600# @ 75¢ less 2.58 baling charges.....	10.07
September 20	By sale of corn 80 Acres, 35 bu. per acre, 1400 bu. @ 35¢ Re- ceivers' share	490.00

1934

April 14	By sale of wheat 383 bu. 45# @ 67¢	236.57
March 13	By check in full of account.....	21.25
Total.....		<u>\$2,308.69</u>

Said Receivers Credit Themselves As Follows:

1932

March 18	J. B. Greeley, Sec. U. S. District Court stenographic services.....	\$.20
March 18	Bates and Company Insurance Receivers' Bond	2.00
March 18	Johnston Letter Service preparing forms for leasing, copies etc.....	1.27
March 18	Ingalls and Selby stenographic and telephone service.....	8.00
March 18	H. L. McCafferty preparing blue prints and maps for the Madison County farm lands.....	1.75
March 18	H. L. McCafferty calculations of taxes on Madison County farms70
March 18	Abernethy and Simkins stenographic and telephone service	8.00
March 26	Mary Vieth stenographic services preparing leases35
April 2	Snyder and Immell clover seed 10 bu. sweet @ 3.50 2 red @9.00	53.00
April 25	Webb Culp Insurance agent Insurance premium	13.00
April 25	A. E. Ford for work on ditch.....	15.00
May 2	The City National Bank and Trust Co. 56 days interest on loan	2.34
July 9	Walter Murry labor per statement	6.00
July 23	P. Speasmaker and Sons. 1/2 of twine used in threshing.....	11.25
August 6	The City National Bank and Trust Co. 92 days interest on loan.....	3.84
August 8	J. O. Graves hauling wheat 385 bu. and 856 bu. oats.....	\$ 11.23

First and Final Account of Receivers

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1932

August 8	F. F. Cecil hauling wheat.....	8.83
August 23	Crites Incorporated 1/2 threshing bill 1099 bu. Wheat, 2033 bu. Oats	47.39
August 23	Howard Chenault hauling 346 bu. Wheat and 508 bu. Oats.....	8.10
September 17	Ed Reed 30 hrs. carpenter labor	6.00
September 17	S. F. Dearth labor and material on pump and well.....	3.02
October 1	P. Spaesmaker pump cylinder per statement	6.50
October 10	The Tanner Robison Lumber Co. per statement	2.50
October 10	P. Speasmaker and Sons per statement	7.78
October 29	The City National Bank and Trust Co. 92 days interest on loan.....	3.84
November 19	The Madison Press per statement	.14
November 28	Smith Agricultural Chemical Co. 5 Ton Fertilizer	42.50
December 3	C. B. Fossett per statement.....	5.70
December 9	Fitzpatrick's Printery per state- ment	2.81
December 30	Crites Incorporated by settlement of Receivers' share of seed. 6 bu. corn @ 40¢ 76 bu. Oats @ 25¢	21.40
December 31	By stenographic fees and services	21.60
December 31	By George Florence on account for expenses	\$ 66.00
December 31	By Richard Simkins on account for expenses	66.00

1933

January 14	Ingalls and Selby on account attorneys' fees as per order of Court	10.00
January 14	Davis Harrison on account attorney's fee as per order of Court	10.00
January 14	George Florence on account for services as per order of Court	10.00
January 14	Richard Simkins on account for services as per order of Court....	10.00
January 28	P. Speasmaker and Sons for barb wire	3.50
February 4	The City National Bank and Trust Co. 92 days interest.....	3.84
April 29	The City National Bank and Trust Co. 89 days interest.....	3.72
April 29	Resaca Farmers Telephone Co. per statement	1.54
April 29	Bates and Company Insurance Renewal premium on bond.....	2.00
June 3	H. L. McCafferty calculation of taxes on Madison County farms	1.75
June 17	P. Speasmaker and Sons. 1 Iron pump	9.00
July 15	Charles Wilson Madison County Treasurer payment of taxes due and delinquent	656.52
July 17	H. L. McCafferty calculation of taxes for remission of penalties \$	1.40
July 19	Madison County Recorder stamps for deed	11.50
July 19	Madison County Recorder recording deed	1.90
July 19	Madison County Auditor transfer or deed13
July 22	Charles Wilson Madison County Treasurer balance on taxes.....	1.81

First and Final Account of Receivers

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1933

July 29	The City National Bank and Trust Co. 92 days interest.....	3.84
August 5	The City National Bank and Trust Co. payment of Receivers' cer- tificate of loan.....	250.00
August 12	P. Speasmakers and Sons 1/2 twine per statement	8.75
August 19	Ohio Grain CoOperative Associa- tion for threshing 1/2 of 767 bu. wheat	23.01
September 9	Mrs. Carrie Ackerman threshing oats 608 bu.....	18.24
September 9	Frank Davis 3 days labor, ex- penses and services.....	8.62
September 23	Mary A. Beathard Madison County Recorder recording can- cellations19
October 7	Credit of loan of The Prudential Insurance Company	490.00
October 14	Marion R. Lutz trip to Columbus Bank in re accounts.....	.16
October 14	H. E. Littler hauling wheat.....	13.09
October 28	Western Union per statement.....	\$.14
November 4	The City National Bank and Trust Co. 6 days interest.....	.28
November 15	S. F. Dearth for services.....	16.80
November 15	S. F. Dearth for transportation in the course of his services.....	8.10
November 15	By stenographic fees and services	27.90
November 15	By George Florence on account for expenses	24.00
November 15	By Richard Simkins on account for expenses	24.00
November 15	Fitzpatrick's Printery per state- ment	1.34

1933

November 15	Telephone Company per statement	15.48
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1934

April 16	By refund for telephone calls.....	1.05
April 16	S. F. Dearth cash during bank moratorium	1.68
April 16	By stenographic fees and services	4.80
April 17	Bates and Company Receivers' Bond50
April 17	U. S. Government, tax on checks	.56
Total.....		\$2,138.62

RECAPITULATION

Total Charges	\$2,308.69
Total Credits	\$2,138.62
Balance.....	\$ 170.07

The State of Ohio, Pickaway County, ss

The undersigned, George Florence and Richard Simkins, Receivers in the Case of the Prudential Insurance Company, Plaintiff, *vs.* H. M. Crites, *et al.*, Defendants, Cause No. in the United States District Court for the Southern District of Ohio, Eastern Division, do solemnly swear that the within and foregoing account and the vouchers filed herein and the balance found herein, is a full, true and correct account of their said administration, to the best of their knowledge and belief.

George Florence and
Richard Simkins

Sworn to before me and subscribed in my presence this
..... day of April, 1934.

Fred P. Griner,
Pickaway County, Ohio.
Notary Public,

The excerpts from the first and final accounts of the receivers filed February 19, 1937 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 to-wit: (a) the charges under date of August 4, 1933; (b) the amount of the total charges; (c) the credits for payments for stenographic and telephone service to Ingalls and Selby and to Abernethy and Simkins under date of March 18, 1932; (d) all three credit entries under date of December 31, 1932; (e) all credit entries under date of January 14, 1933; (f) all credit entries under date of July 19, 1933; (g) all credit entries for telephone expense, stenographic fees, and payments to George Florence and Richard Simkins under date of November 15, 1933; (h) credits for stenographic fees under date of April 16, 1934; (i) the amount of total credits; and (j) the amount of balance;—are as follows:

	928	929	930	931	933	934	935	936	937	947
Charges under date of Aug. 4, 1933										
By refund for expense transferring deed.....	\$.13	.13	.13	.14	.14	.14	.14	.14	.14	.14
By refund for expense recording deed.....	2.00	1.90	1.90	1.90	1.60	2.00	2.00	1.60	1.60	2.00
By refund for U. S. Revenue stamps for deed.....	13.00	15.50	10.00	22.00	6.50	23.50	33.50	10.00	11.00	9.50
TOTAL CHARGES.....	5375.96	3158.84	2040.92	4602.85	1433.11	5315.84	7575.61	2346.51	2517.83	2546.98
Credits for payments for stenographic and telephone service March 18, 1932										
Ingalls & Selby.....	8.00	10.00	6.00	14.00	4.00	16.00	22.00	6.00	8.00	6.00
Abernethy & Simkins.....	8.00	10.00	6.00	14.00	4.00	16.00	22.00	6.00	8.00	6.00
Credit entries of Dec., 31, 1932.										
By stenographic fees and services.....	21.60	27.00	16.20	37.80	10.80	43.20	59.40	16.20	21.60	16.20
By George Florence on account for expenses.....	66.00	82.50	49.50	115.50	33.00	132.00	181.50	49.50	66.00	49.50
By Richard Simkins on account for expenses.....	66.00	82.50	49.50	115.50	33.00	132.00	181.50	49.50	66.00	49.50
Credit entries of Jan. 14, 1933.										
Ingalls & Selby on account for attorneys fees as per order of Court.....	10.00	12.50	7.50	17.50	5.00	20.00	27.50	7.50	10.00	7.50
Davis Harrison on account for attorneys fees as per order of Court.....	10.00	12.50	7.50	17.50	5.00	20.00	27.50	7.50	10.00	7.50
George Florence on account for services as per order of Court.....	10.00	12.50	7.50	17.50	5.00	20.00	27.50	7.50	10.00	7.50
Richard Simkins on account for services as per order of Court.....	10.00	12.50	7.50	17.50	5.00	20.00	27.50	7.50	10.00	7.50
Credit entries July 19, 1933.										
Madison County Recorder for stamps for deed.....	13.00	15.50	10.00	22.00	6.50	23.50	33.50	10.00	11.00	9.50
Madison County Recorder—recording deed.....	2.00	1.90	1.90	1.90	1.60	2.00	2.00	1.60	1.60	2.00
Madison County Auditor—transfer of deed.....	.13	.13	.13	.14	.14	.14	.14	.14	.14	.14
Credit entries Nov. 15, 1933.										
By telephone expenses.....	15.49	19.35	11.62	27.11	7.75	30.98	42.60	11.62	15.49	11.61
By stenographic fees and services.....	27.90	34.88	20.92	48.82	13.95	55.80	76.72	20.93	27.90	20.93
By George Florence on account for expenses.....	24.00	30.00	18.00	42.00	12.00	48.00	66.00	18.00	24.00	18.00
By Richard Simkins on account for expenses.....	24.00	30.00	18.00	42.00	12.00	48.00	66.00	18.00	24.00	18.00
Credits for stenographic fees and services April 16, 1934.....	2.40	3.00	1.80	4.20	1.20	4.80	6.60	1.80	2.40	1.80
TOTAL CREDITS.....	3741.91	3490.44	2090.78	4277.36	1303.23	4644.39	7391.40	2157.02	2465.88	1660.28
BALANCE.....	1634.05			325.49	129.88	671.45	184.21	189.49	51.95	886.70

It is hereby stipulated by Crites, Incorporated, the appellant, through Arnold, Wright, Purpus & Harlor and Haffenberg & Rosenbaum, its attorneys, that the remaining twenty-one accounts of the receivers filed February 19, 1937 follow the same pattern as the first account of the receivers filed February 19, 1937, in Cause Number 927.

HAFFENBERG & ROSENBAUM
ARNOLD WRIGHT PURPUS & HARLOR
Attorneys for Crites, Incorporated,
Appellant.

ENTRY.

(Entered May 13, 1937.)

This 13th day of May, this cause coming on to be heard upon the final account filed by the receivers herein and upon their application for confirmation, and upon the application of O. C. Ingalls, attorney for the receivers, for compensation and expenses, the Court orders and directs that a hearing be had upon the report and the applications on the 2nd day of June, 1937, at ten o'clock a.m., and that all parties interested in said receivership be notified by the receivers of the date of said meeting.

Approved:

/s/ UNDERWOOD
Judge.

/s/ O. C. INGALLS
Attorney for Receivers.

The orders entered on May 13, 1937 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

**OBJECTIONS OF THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA TO APPLICATION OF O. C.
INGALLS FOR ADDITIONAL COMPENSATION.**

(Filed June 2, 1937.)

The Prudential Insurance Company of America, the Objector herein, is a corporation organized and existing under the laws of the State of New Jersey, and admitted to transact business in the State of Ohio. It is the petitioner in the above entitled suits In Equity.

Objector says that petitioner O. C. Ingalls was employed as associate counsel for the petitioner in the filing and prosecution of the foreclosure suits; that from such employment the petitioner received the sum of \$1,100.00 in payment; that said services were performed under an express contract and that payment in full has been made for said services.

Objector further says that the services itemized in the pending petition include at least 100 hours of services rendered in connection with said separate employment agreement for which the petitioner has been paid in full.

Objector further says that the allegation of the petitioner regarding the alleged profit made by it from the sale of the mortgaged real estate is not true in fact; that the question of said profit or loss is not material to the pending petition but that in truth and in fact the book profit to it from said farms without charging or deducting any administrative and office expense is substantially the sum of \$9,000.00 and that on deducting proper office and overhead expense items, its profit will amount to little if anything.

Objector further says that of the \$64,761.00 handled by the receivers, a substantial amount thereof, to wit: \$16,656.40, was lent to the receivers by it for the payment of taxes; that another sum of \$901.20 was lent by it to the receivers for the payment of insurance premiums; that an additional sum of \$5,825.00 was borrowed by the receivers from banks, leaving an operating income in fact of \$38,710.12.

Objector is informed and believes that the receivers have on hand approximately \$1800.00; that there is still

an unpaid balance due on the advancements made by it to the receivers of approximately \$2,000.00 and that in truth and in fact on the repayment of said advancements, the receivership herein would be insolvent and unable to liquidate the receivership expenses.

Objector further says that out of \$38,710.12, operating income, there has been deducted in fees and expenses the sum of \$11,203.79.

Objector further says that said operating income of \$38,710.12 represents the income for the years 1932 and 1933 from approximately 7100 acres of land in Madison and Pickaway Counties, Ohio, representing a gross average, annual income per acre of approximately \$2.60 per acre and after deducting the fees and expenses heretofore charged, leaving a net income of less than \$2.00 per acre, and that after deducting taxes, the net income per acre would be little less than \$1.00 annually.

Objector further says that during all the period of said receivership, one of the receivers, Richard Simkins, was duly admitted to practice before the bar of this court and that the said Simkins as a part of his services made and prepared all reports and other pleadings filed by the receivers in this cause.

Objector further says that the allegation as to its preventing other bidders at the foreclosure sale is not true in fact.

Objector further says that the additional compensation sought by the petitioner is excessive and should not be allowed.

/s/ DAVIS HARRISON

*Attorney for Objector, The Prudential
Insurance Company of America*

STATE OF INDIANA }
COUNTY OF MARION } ss:

DAVIS HARRISON, being duly sworn, says that he is attorney for the objector, The Prudential Insurance Company of America; that he has prepared and read the above and foregoing objections; that the allegations therein contained are true; that the objector is a non-resident of the State of Ohio and of the Southern District of Ohio; that

it has no executive officer in this jurisdiction and that affiant is authorized to and does make this affidavit for and on behalf of the objector; and further affiant saith not.

/s/ DAVIS HARRISON

Subscribed and sworn to before the undersigned, a Notary Public in and for said county and state, this 1st day of June, 1937.

/s/ MAJELLA G. FALLS,
Notary Public.

My Comm. expires Jan. 14, 1939.

GENERAL ORDER OF REFERENCE.

(Entered June 2, 1937)

The above named causes are hereby referred generally to G. H. Butt, one of the Referees in Bankruptcy of this Court, as Special Master, with instructions to report generally and upon specified issues.

/s/ MELL G. UNDERWOOD
Judge, U. S. District Court.

The general orders of reference entered June 2, 1937 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order entered in Cause No. 927.

EXCEPTIONS TO THE ACCOUNTS OF RICHARD SIMKINS AND GEORGE FLORENCE, RECEIVERS HEREIN.

(Filed July 24, 1937.)

Now comes Crites, Inc., one of the defendants herein, and represents to the court that it was the owner of the equity of redemption in the real estate described in the second cause of action in the petition filed herein, and excepts to the account of Richard Simkins and George Florence, receivers of the real estate in said petition described, in the following particulars, to-wit:

1. Although the said receivers were appointed by order entered in said cause on the 17th day of February, 1932, no interim reports or any reports were filed by the said receivers until the 19th day of February, 1937.

2. Said receivers withheld filing their account more than a reasonable time after July 18, 1933, the date of the order confirming the marshal's sale herein; and such reasonable time would have been only such time as would be required to dispose of growing crops and effect miscellaneous collections, and such time should have been not later than the 1st day of December 1933; and said receivers were derelict in their duties in not filing any report immediately after the sale so as to have apprised all defendants of the status of the receivership.

3. Credits for disbursements (other than those for the compensation of the receivers and their attorneys as ordered by the court on January 14, 1933, the payment of taxes and insurance premiums for fire and tornado insurance) were not authorized by any order of this court and are not shown to be necessary or proper for the preservation of the property and should not be allowed; which credits include more particularly those credits for stenographic fees and services and telephone services made on March 18, 1932, December 31, 1932, November 15, 1933 and April 16, 1934, and also the expenses of December 31, 1932 and on November 15, 1933 to each of the said receivers.

4. Credits for the payment of the expenses of the receivers are excessive, improper, duplicated and not authorized by any order of court, and should not be allowed,

the payments having been made without notice to, or the knowledge of, Crites, Inc.; which credits include more particularly those credits for stenographic fees and services and telephone services made on March 18, 1932, December 31, 1932, November 15, 1933 and April 16, 1934, and also the expenses of December 31, 1932 and on November 15, 1933 to each of the said receivers.

5. No vouchers or receipts are filed with the account showing payment of the items for which credit is taken in said account.

6. Said account is incomplete in that the records kept and maintained by the receivers were not complete or adequate and do not truly reflect the transactions of the receivers and do not warrant any credit to them for the cost of keeping said records; and in that the books maintained were so incomprehensive that no intelligent report can be made therefrom and no separate or detailed allocation of the expenses could be made to the respective parcels of real estate in the respective causes; in that said account purports to be only of receipts and disbursements; in that said account fails to distinguish between items of farm income and receipts from tenants in repayment of loans; in that said account fails to distinguish between loans to tenants and farm expenses; in that said account fails to set forth what loans were made, repaid and not collected, whether the same were secured or unsecured, and the reason for the failure to collect the same; in that the same does not set forth the disposition of a check from the Home Insurance Company in the amount of \$2,200.00 by compensation for loss of a barn on one of the farms in these causes; in that the items of payment for taxes do not show for what years' taxes the said payments were made; and in other particulars as appears upon the said account of the said receivers.

7. That credits should not be allowed for bookkeeping and clerical expenses, because the records were so inadequate and incomplete and because credits are being claimed for bookkeeping and clerical expenses after the necessity therefor had ceased.

8. That the said receivers should be charged with all loans made to tenants to the extent the same were not repaid, no authority having been granted by any court order.

to make loans to tenants and no showing having been made why the unpaid loans have not been paid.

9. Said account does not include all receipts of fees, compensation, remuneration or commissions received by the receiver or receivers in connection with the administration of the receivership and in connection with property in the custody of said receivers.

10. Said account is incomplete in that the receiver Simkins does not charge himself with fees, compensation or commission which were received by him from one E. F. Jones of Washington Court House, Ohio, and from O. C. Ingalls, which fees, compensation and commissions were received by him while receiver of the real estate in this cause, and not disclosed in said report and received by him without any order of court allowing the same to him.

11. No credits should be allowed to the receiver Simkins for any compensation whatsoever to him for his services as receiver because of his misconduct and for his violation of his duties and obligations as receiver and because of the matters and things as in these exceptions set forth.

12. No credits should be allowed either of the said receivers for compensation to the attorneys, or any of them, of the said receivers, and no compensation should be payable to the receivers' attorneys because of the misconduct and the violation by the said attorneys of their duties and obligations and because of the matters and things in these exceptions set forth.

13. The said Richard Simkins as receiver in cases numbered 927, 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 should be charged in addition to the above with the sum of \$56,000.00 by reason of the loss to this defendant, Crites, Inc., occasioned by the acts and misconduct of the said receiver Richard Simkins in combination and conspiracy with the plaintiff and with said E. F. Jones acting for and in behalf of one William Proctor as is more fully hereinafter set forth.

In support of the foregoing exceptions, this defendant, Crites, Inc., sets forth the following:

That at and prior to the time of the commencement of the foreclosure proceedings in each of these causes by the plaintiff, Prudential Insurance Company of America,

a corporation, the said Richard Simkins, of Circleville, in Pickaway County, in the State of Ohio, was an agent and attorney of the plaintiff acting for and in its behalf; that the said plaintiff, upon the recommendation of said Simkins, engaged the law firm of Ingalls and Selby as and for its attorneys to act for and in its behalf together with one Davis Harrison, likewise its attorney, to file herein its petitions for foreclosure, to prosecute its said suits, to obtain judgment and to represent it as its attorneys; that it was agreed by the plaintiff, by its attorneys, the said Davis Harrison, and Ingalls and Selby, with the said Simkins, that the plaintiff would request the court to appoint the said Simkins as receiver herein of the property described in its said petitions for foreclosure, and that he, the said Simkins, would then engage the said Davis Harrison and the said firm of Ingalls and Selby as attorneys for the receiver; that it was further then and there agreed that all fees that would be payable in said proceedings to the said Richard Simkins, the receiver, and to the attorneys for the receiver, and all fees paid by the plaintiff to its attorneys, and all fees, compensations and commissions otherwise earned in connection with the sale of the said real estate, and in connection with other matters arising out of said receivership would be divided among them; that this agreement for the division of fees was not at any time disclosed to the Honorable Benson W. Hough, who was then the judge of this court, and acting herein, nor in any manner to this court, nor to this defendant until the hearings aforesaid in the month of June, 1937, before this court and the Special Master; that pursuant to the said agreement the foreclosure petitions were filed herein by the plaintiff, and the plaintiff did recommend the appointment of the said Simkins as receiver herein and succeeded in having the said Simkins appointed as a receiver with one George Florence; that the said receivers did thereafter employ the said Davis Harrison and the said Ingalls and Selby as the attorneys for the receivers; that subsequent thereto fees were received by the said Ingalls and Selby and the said Simkins; and said fees were divided by the said Ingalls and Selby and the said Simkins and the said Davis Harrison, among themselves; that a very substantial part of the services ren-

dered by the said attorneys were rendered for and in behalf of the plaintiff as will appear from the statement of services filed herein by the said O. C. Ingalls; and that the said plaintiff and its said attorneys and the said Simkins by their agreement sought to have the compensation of the said attorneys paid substantially by this defendant, Crites, Inc., out of its said equities of redemption, or the proceeds thereof, the same being to the injury, damage and loss of Crites, Inc., and in violation of the laws of the State of Ohio with respect to the payment of attorneys' fees; and that said agreement to divide the fees and the said division of fees was illegal and against public policy; and such willful misconduct and impropriety and that hereinafter set forth disqualify the said Simkins and the said attorneys from any right to compensation herein for services.

That prior to the time of the marshal's sales held on the 1st day of July 1933, in these causes, one Colonel William Procter of Cincinnati, Ohio, engaged and employed one Edwin F. Jones of Washington Court House, Ohio, to purchase the real estate lying and situated in Madison County in the State of Ohio and described in the plaintiff's petitions in cause Nos. 927 to 931 both inclusive, causes Nos. 933 to 937 both inclusive and in cause No. 947 at a price of \$281,000 said Procter agreeing with said Jones that the said Jones could retain the difference between \$281,000 and any lesser sum for which he, the said Jones, could acquire said property, as and for his compensation and remuneration, which arrangement was disclosed by the said Jones to the said Simkins prior to the marshal's said sales.

That thereafter and prior to July 1st, 1933, the date of the marshal's said sales, the said Simkins, acting in pursuance of his said agreement and desiring to obtain the compensation promised and agreed to be paid him by the said Jones, did use his offices and influence in violation of his duties as receiver to bring about an arrangement between Jones and the plaintiff for the purchase of said Madison County real estate by the said Jones, acting for and in behalf of said Procter; and by reason of the offices and influence of the said Simkins, the said Jones acting for and in behalf of the said Procter and Prudential In-

Insurance Company of America did prior to the marshal's sales aforesaid enter into an arrangement and agree that the said Jones would purchase from the plaintiff the real estate in Madison County, Ohio, at a price of \$249,106.00, which amount was substantially in excess of the mortgage indebtedness thereon owing to the plaintiff and all accrued interest, taxes and charges, the said Simkins knowing that it was the intention and part of the arrangement for the plaintiff to bid in the properties at the marshal's sale (which the plaintiff did bid in for a total sum of \$164,000) and also knowing that the difference between the said \$249,106.00 and the \$281,000, which the said Procter was willing to, and did pay therefor, would be divided between Jones, Simkins and Harrison; that division thereof was later made between the said Simkins, Harrison and Jones.

That it was also agreed that the instrument evidencing the said agreement would not be completed and formally executed by the plaintiff until after the said sale; that their intention was that the agreement would take such form so that it could be represented that only an offer had been received and thereby conceal the agreement between the parties.

That on, to-wit, the 27th day of June, 1933, said Simkins received from the said Jones, acting for and in behalf of the said William Procter, the certain instrument in writing, a copy of which is hereto attached, and by express reference thereto made a part hereof, as if more fully set out herein; and that the said Simkins did on June 27, 1933, pursuant to an arrangement with the plaintiff for the sale of said properties, send the same to the plaintiff; and that the said Jones, acting for and in behalf of the said Procter, did likewise deliver to the plaintiff a certified check in the sum of \$3,000, and deposited the same with the plaintiff as earnest money.

That the said plaintiff and the said Jones, acting for and in behalf of the said Procter, and the said Simkins conspired that the plaintiff should bid in the said Madison County real estate; that at the said sales on the 1st day of July, 1933, by the marshal, the plaintiff, notwithstanding the matters and things herein set forth, bid in the said respective parcels of real estate in Madison County, at slightly in excess of two-thirds of the appraised value

of the said real estate, its total bid for all of the Madison County real estate being in the sum of \$164,000; that the said Jones attended the said sale, but in reliance upon his said agreement with the plaintiff, did not bid thereat and stood mute and permitted the plaintiff to make its said total bids of \$164,000, notwithstanding that the said Procter, the principal of the said Jones, was willing to purchase all of the said Madison County real estate at a price up to \$281,000.

That none of the said negotiations or dealings or agreements between the plaintiff, the said Simkins, and the said Jones were communicated to this defendant or to the said George Florence, the co-receiver herein, or to the court; and the said plaintiff and its attorneys and the said Simkins and the said Jones and the attorneys for the receivers concealed all of the said matters and things from both this defendant and the court.

That the said Procter, as purchaser, was ready, willing and able to pay to the plaintiff in payment of the aforesaid Madison County real estate a price in excess of the indebtedness thereby secured and the accrued taxes and other advancements owing to it, to-wit, up to \$281,000; and of this the said plaintiff had full knowledge prior to the marshal's said sale.

That the plaintiff and the said Simkins and Jones did thereby seek, intend and conspire to defraud and deprive this defendant of the value of its equity in said real estate and to utilize the extent of the value of any or all of the aforesaid Madison County real estate in excess of the indebtedness of Henry M. Crites and May R. Crites thereby secured and the liens thereon, in off-setting possible losses on other indebtedness to it of the said Henry M. Crites and May R. Crites not adequately secured, there being no provision in any of the said mortgages or notes made and delivered to the plaintiff by the said Henry M. Crites and May R. Crites authorizing such practice, as more fully appears from the said notes and mortgages, set forth in plaintiff's petitions; and that pursuant to said conspiracy and without having made disclosure thereof to this defendant or to this court and without the said Simkins, a receiver herein, having done so, and having in hand the agreement aforesaid and the earnest money as aforesaid,

and ignoring completely the value of the said Madison County real estate (other than to assure that the bid made at the sale would at least be the minimum amount fixed in the decree of sale, to-wit, two-thirds of the appraised value thereof), the plaintiff bid in on all of the said real estate the said sum aggregating \$164,000.

That in making its written motion to this court for the confirmation of said sale the said plaintiff concealed from the court the matters and things herein set forth with the intent of defrauding this defendant and taking advantage of it in pursuance of the said conspiracy and agreement, and induced the court to believe that bona fide deficiencies existed.

That thereafter and in pursuance of the agreement aforesaid made with the said Jones, acting for and on behalf of the said William Procter, the said plaintiff did convey all of the aforesaid Madison County real estate to Mary E. Johnston, which deed was dated the 4th day of August, 1933, duly acknowledged and recorded on the 21st day of August, 1933, by the recorder of Madison County, in the State of Ohio, in Volume 113 of Deeds, at Page 63; that the said deed recited a consideration of \$249,106, but had affixed thereto United States documentary stamps in the sum of \$281,000 in payment of the stamp tax thereon, thereby evidencing a consideration of \$281,000; that the said conveyance was made to the said Mary E. Johnston at the direction of the said William Procter, the said Mary E. Johnston being then of kin to the said William Procter and having paid no consideration to the plaintiff; that the said William Procter, thereby ratifying and approving all of the matters and things done for and in his behalf by the said Edwin F. Jones, did, in consideration of the said deed by the plaintiff to the said Mary E. Johnston, pay to the plaintiff the total sum of \$249,106 and the balance at different times to the said Edwin F. Jones or to persons in his behalf as and for his compensation and remuneration in effecting the purchase and acquisition of the said real estate, being the sum of \$32,000, which the said Jones did divide with the said Simkins, paying the said Simkins in pursuance of their said agreement the sum of not less than \$2,797; and that the said Simkins

did thereafter make a division thereof with the said Davis Harrison.

That the sums so paid to the said Jones by the said Procter were far in excess of what would be a reasonable and customary compensation to a real estate broker at said time and place for the services rendered by the said Jones in effecting said purchase and acquiring the said Madison County real estate; and that a reasonable compensation for such services would not have exceeded five per-cent of the purchase price thereof.

That the said Simkins in violation of his trust as receiver herein accepted such compensation from the said Jones, and at the same time was charging and expecting a compensation, and was paying to himself a compensation for his services as receiver in the foreclosure proceedings herein which involved the real estate so sold to the said Procter by the plaintiff and of which the said Simkins was a receiver; and that the said Simkins has requested fees of this court for his services including his services rendered for and on behalf of the said Jones and the plaintiff in effecting the sale of said Madison County real estate to the said Procter.

That the said plaintiff did discourage bids being made at the marshal's said sale with respect to all of the said real estate in Madison County and also the real estate in Pickaway County, in the State of Ohio; and that reference is hereby made to the petition filed in these causes by O. C. Ingalls, one of the attorneys for the plaintiff and one of the attorneys for the receiver, wherein he did state:

"It was sold to the Prudential Insurance Company, no one else having a chance, for \$308,000, plus, and the Prudential Insurance Company a few months thereafter sold all the farm for an amount which enabled them to get approximately \$200,000 profit, so the Prudential Insurance Company should not be permitted to complain concerning fees asked, and they should be compelled to pay into this estate an additional sum of money so that a fee commensurate with the services rendered could be asked by both counsel and the receivers."

and to which petition were attached supporting statements containing the following:

"The farms were sold at public auction to the Prudential Insurance Company for \$308,000 on the 1st day of July 1933, and within a few months after the sale the Prudential sold these farms for showing the tremendous profit to the Prudential Insurance Company. The tremendous size of these farms and the fact that the Prudential Insurance Company did insist upon buying all of them, kept away a great many bidders who were interested in buying these farms."

That notwithstanding that the said sales were held on the 1st day of July, 1933, and the same confirmed by order entered July 18, 1933, no report was filed by the said receivers with this court until the 19th day of February, 1937; and that this defendant was not advised of either the filing of said report or the application for the approval of same until the receipt in the month of May, 1937, of a letter from the said Davis Harrison; that the said receivers in making application to the court for various order did so without notice to this defendant; and that the said receivers manipulated the funds of the said receivership by employing a part thereof in payment of the expenses and attorneys' fees of the said plaintiff; and that among the services of the attorneys for the receivers for which compensation has been asked are services rendered by the said attorneys in preparing the foreclosure petitions, in preparing petitions for the appointment of receivers and in preparing the decrees, which are services for which compensation should be paid only by the plaintiff.

That the acts and dealings herein set forth of the plaintiff, the said Simkins, the said Jones, acting for and in behalf of the said William Procter, were collusively entered into so that the plaintiff might acquired the aforesaid Madison County real estate at less than its true value, that the plaintiff, the said Simkins, the said Jones and the said Procter would profit at the expense of this defendant in depriving this defendant of the value of the aforesaid real estate in excess of the indebtedness to the plaintiff thereby secured and in applying the same to offset other deficiencies that might arise on other indebtedness of the said Henry M. Crites and May R. Crites, and in appropriating for the plaintiff the said Madison County

real estate, and in dividing among themselves the value thereof in excess of the indebtedness to the plaintiff.

That it did not learn of the matters and things herein set forth until the hearings before this court and its said Special Master in the month of June, 1937.

That on the 30th day of August, 1933, the recorder of Madison County, Ohio, did make and enter a marginal release with reference to each of the mortgages described in the petitions filed by the plaintiff in cause Numbers 927 to 931 inclusive, 933 to 937 inclusive, and cause No. 947, which marginal release is substantially as follows:

"August 4, 1933

The lien of the within mortgage is hereby released and discharged.

The Prudential Ins. Co. of America

Franklin D. Oliver, Vice-President

E. J. MacIver, Assistant Secretary"

"The above release entered from the original mortgage." August 30, 1933, Mary A. Bethard, Recorder;

That the judgments entered in the aforesaid causes involving the real estate in Madison County, Ohio, the acreage, the appraisals of the said real estate, the amount of the bids at the marshal's sales on July 1, 1933, and the deficiency judgments entered therein are as set forth in the table thereof.

ARNOLD, WRIGHT, PURPUS & HARLOR,
HAFFENBERG & ROSENBAUM,
Attorneys for Crites, Incorporated.

STATE OF OHIO

FRANKLIN COUNTY, ss:

J. C. Harlor, being duly sworn, says that he is an officer, to wit, President, of Crites, Incorporated, and that the facts stated in the foregoing exceptions are true to the best of his information and belief.

Sig/ J. C. HARLOR

Sworn to before me and subscribed in my presence this 23rd day of July, 1937.

M. O. McCONATHEY,
*Notary Public, Franklin
County, Ohio.*

(Seal)

To the Prudential Insurance Company
of America

Circleville, Ohio

June 27, 1933.

Whereas The Prudential Insurance Company of America has pending in the District Court of the United States for the Southern District of Ohio, Eastern Division certain foreclosure proceeding in which said company is plaintiff and H. M. Crites, Crites Incorporated and others are defendants; Said causes being specifically numbered on the docket of said Court as Causes 927, 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947, and being for foreclosure of mortgage on Three Hundred Fifteen (315) acres, Four Hundred Forty-seven and Ten Hundredths (447.10) acres, Three Sixty-eight and six hundredths (368.06) acres, Five Hundred (500) acres, Two hundred five and fifty-three hundredths (255.53) acres, Six hundred twenty-seven and fifty-three hundredths (627.53) acres, Nine hundred ninety-five and sixty-seven hundredths (995.67) acres, three hundred sixty-six and 12 hundredths (366.12) acres, two hundred eighty-seven and thirty-nine hundredths (287.39) acres, and Three hundred and eleven hundredths (300.11) acres. The above described lands are situated in Deer Creek — Monroe School District, Somerford — Monroe School District and Monroe Township, Madison County, Ohio.

And whereas such proceedings have been had in said causes that orders of sale have issued therein to the United States Marshal and said lands are advertised for sale at public auction on July 1st, 1933.

Now, therefore, in contemplation of the acquisition of title to said lands by the said The Prudential Life Insurance Company of America and provided said lands are purchased by said company on July 1st, 1933,—the undersigned agrees to purchase from said company said Four Thousand Eight Hundred forty-four and 14/100 (4844.14) acres of land and pay therefor the sum of \$249,106.00 net to said company, payable in cash upon the delivery of a deed of general warranty to the undersigned from said company, warranting, said lands to be free and clear of all incumbrances except the taxes due and payable on June,

1934. Said conveyance also to carry the company's undivided one-half interest in the growing corn crop thereon in accordance with the existing lease thereon.

The Company to furnish abstracts of title to said lands up to date of conveyance to undersigned.

The deed to be executed and delivered to the undersigned his heirs or assigns by The Prudential Insurance Company of America within sixty days after the acquisition of title thereto on July 1st, 1933.

As evidence of good faith in making the above offer and as a payment on said offered consideration the undersigned deposits herewith a certified check payable to the order of The Prudential Insurance Company of America in the sum of \$3,000.00 said check not to be cashed by said company until after the sale on July 1st, 1933. Upon said sale being made and the said The Prudential Insurance Company of America having bid in said premises and this offer having been accepted by said company in the manner hereinafter set forth the check to be cashed and credited upon the purchase price of said premises. Upon the acceptance of this offer as hereinafter set forth the undersigned hereby agrees to pay within forty-eight hours following said acceptance the further sum of \$10,000.00 to be credited upon said purchase price. Upon the failure of the undersigned to carry out any of the provisions of this contract any money deposited hereunder to be retained by The Prudential Insurance as compensation and expenses incident to the acceptance of this offer.

That balance of said offered purchase price to be paid in cash upon a delivery of a deed for said premises to the undersigned as hereinbefore provided.

It is further stipulated that upon the acceptance of this offer by said company—and following the sale on July 1st, 1933,—should said company acquire title, and pending the conveyance by said company in pursuance of this offer the undersigned shall have the right of entry to said premises for any seeding purposes.

The above offer is made in triplicate this 27th day of June, 1933, and must be accepted by said company by July 6, 1933, in writing by indorsement on each of said copies one of which to be retained by said company and

two to be mailed to Richard Simkins at Circleville, Ohio and the time within which the payment of \$10,000.00 is to be made is to be computed from the date of the receipt of this accepted offer at the office of Richard Simkins.

Signed: EDWIN F. JONES

Witness:

RICHARD SIMKINS
MARION R. LUTZ

This offer is accepted by The Prudential Insurance Company of America this third day of July, 1933.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA.

By A. M. WOODRUFF,
Vice President.

Attest:

B. L. WORTHINGTON,
Assistant Secretary

MADISON COUNTY FARMS

Suit No.	Acreage	Mtge. Prin.	Judgment 5/2/33	Appraisal	7/1/33 Bid	Deficiency 7/18/33
927	315	\$13,000.00	\$15,199.23	\$16,780.00	\$11,300.00	\$ 4,254.57
928	431.57	16,500.00	19,484.06	19,400.00	13,000.00	6,811.39
929	447.10	17,000.00	19,971.59	22,900.00	15,300.00	5,007.11
930	368.06	14,350.00	15,784.57	14,350.00	9,600.00	6,449.75
931	500	21,000.00	24,553.88	32,500.00	22,000.00	2,966.38
933	205.53	8,000.00	9,353.90	9,250.00	6,200.00	3,311.04
934	627.59	25,000.00	29,229.46	34,500.00	23,100.00	6,620.51
935	995.67	42,000.00	49,105.43	49,750.00	33,500.00	16,430.40
936	366.12	13,500.00	15,784.57	14,650.00	9,800.00	6,249.75
937	287.39	11,000.00	12,829.52	16,200.00	10,900.00	2,145.05
947	300.11	11,500.00	13,446.11	13,800.00	9,300.00	4,372.00

The exceptions of Crites, Incorporated to the receivers' reports filed July 24, 1937 in Causes Nos. 928; 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing exceptions of Crites, Incorporated to the accounts of the receivers in Cause No. 927.

APPLICATION

(Filed September 29, 1937.)

Now comes O. C. Ingalls, one of the attorneys for the receivers, and makes application herein for an allowance in addition to that heretofore requested, and asks that he be allowed \$300.00 additional for services rendered in this court in defense of receivers and their final account, and further requests that should this cause go to the Circuit Court of Appeals that an additional allowance be made for services rendered in that court.

/s/ O. C. INGALLS

*Attorney for Receivers.***ORDER**

(Entered July 18, 1938.)

This cause coming to be heard upon the motion of the Receivers to strike in the caption of the accounts filed herein the words "and Final", which caption now reads "First and Final Account of Richard Simkins and George Florence as Receivers"; the Court being fully advised in the premises finds that the account filed is in fact the First Account, and permits the Receivers to strike the words "and Final", leaving the caption to read "First Account of Richard Simkins and George Florence as Receivers".

/s/ UNDERWOOD

United States District Judge.

The orders entered July 18, 1938 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing order in Cause No. 927.

REPORT OF SPECIAL MASTER—G. H. BUTT.

(Filed February 16, 1939)

To the Honorable Mell G. Underwood, Judge, United States District Court, Southern District of Ohio, Eastern Division:

I Statement of Authority:

By an order of this Honorable Court, a copy of which is marked Exhibit M-1, attached hereto and made a part hereof, the above entitled causes were referred to the undersigned Special Master with "instructions to report generally and upon specified issues."

II Proceedings of the Master:

Pursuant to the order aforesaid, duly noticed hearings were held before the Master on June 11, 1937; June 30, 1937; September 29, 1937; and July 12, 1938 and in addition to the evidence produced before the Master therein, the record produced in the hearing before this Court June 2, 1937, was introduced herein to be considered with the evidence before the Master.

III Background of the Action:

Cases No. 927 to 948, both inclusive, are involved in this equity proceeding. Each of the cases was brought by The Prudential Insurance Company of America against Henry M. Crites, May R. Crites, and Crites, Inc., *et al.* The proceedings were begun for the purpose of enforcing the rights of the Prudential Insurance Company as mortgagee, under certain notes and mortgages each separately constituting a lien against twenty-two respective tracts of farm land; eleven of which were located in Pickaway County, Ohio, and the remaining eleven in Madison County, Ohio. In the course of the proceedings the Prudential sought foreclosure of its twenty-two separate mortgages and requested the appointment of receivers.

The parties most directly interested, were Henry M. Crites, and May R. Crites, mortgagors; the Prudential Insurance Company of America, mortgagee; and Crites, Inc., owner of the equity of redemption.

At the inception of the proceedings, the Honorable Benson W. Hough, then Judge of this Court, appointed George Florence and Richard Simkins co-receivers herein:

"to collect the rents and proceeds of the real estate described in the second cause of action in plaintiff's petition herein and/or to operate and manage said real estate through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the Court."

This order was entered February 17, 1932 and the powers, duties and responsibilities thereunder were never substantially altered by any subsequent order of the Court; with the exception of specific powers to make leases, borrow money, or to perform other acts included, at least by inference within the terms of the original order. It may also be mentioned that orders *pro confesso* were entered in said cases March 22, 1933, and decrees *pro confesso* on May 2, 1933. This was after the time within which to plead had been once extended by the Court upon application of the defendants, Henry M. Crites, May R. Crites, and Crites, Inc.

IV Questions here Presented:

The questions presented for consideration by the Master under the order of reference include the following:

- a. The application of O. C. Ingalls, attorney for the Receivers, for allowance of compensation of his services as such, in the amount of \$1,200.00 and expenses in the sum of \$65.00;
- b. The accounts of Richard Simkins and George Florence, Receivers; and
- c. Exceptions to said accounts filed on behalf of Crites, Inc.

It is with these issues that it is now proposed to deal.

V *Exceptions by Crites, Inc., to Receivers' Accounts:*

—1—

"Although the said receivers were appointed by order entered in said cause on the 17th day of February, 1932, no interim reports or any reports were filed by the said receivers until the 19th day of February, 1937."

—2—

"Said receivers withheld filing their account more than a reasonable time after July 18, 1933, the date of the order confirming the marshal's sale herein; and such reasonable time would have been only such time as would be required to dispose of growing crops and effect miscellaneous collections, and such time should have been not later than the 1st day of December, 1933; and said receivers were derelict in their duties in not filing any report immediately after the sale so as to have apprised all defendants of the status of the receivership."

Casual examination is sufficient to indicate that these first two exceptions cannot be construed as valid objections upon which to base refusal or confirmation or approval of the accounts. Such facts may have some bearing, in a proper case, upon the compensation of the Receivers, but to deny confirmation upon such grounds could only result in an aggravation of the condition complained of; that is, the delay. Obviously, there is neither point nor justice in considering that accounts filed too late may not be considered and confirmed, and this is true regardless of the reason or motive causing the delay. The Master is of the opinion that fiduciaries must account whether early or late, and the Court must pass upon the correctness of such accounts regardless of the promptness with which they are filed.

It is argued by the Exceptors that this delay in filing the accounts is an indication of irregularity on the part of the Receivers. However, in this particular case it is necessary to consider more than the mere fact that Receivers were appointed February 17, 1932 and filed their accounts February 19, 1937.

In the first instance the positions of the Receivers and their counsel in this proceedings were rather unusual. In selecting them, Judge Hough appointed Richard Simkins and George Florence, Receivers, and O. C. Ingalls and Davis Harrison became their counsel. The record will show that Mr. Florence had no other connections; that Mr. Ingalls and Mr. Harrison were then acting attorneys for the plaintiff, the Prudential Insurance Company in these cases. This inter-relationship among the parties has considerable bearing upon the delay in filing accounts.

The Receivers were appointed February 17, 1932; the judicial sales took place July 1, 1933, confirmation was made on July 18; the last transaction of the Receivers occurred about April, 1934, and in April or May, 1934, as shown by the uncontradicted testimony in the record, the Receivers brought their accounts and vouchers to this Court. At that time, the accounts and vouchers were delivered to his Honor, Judge Hough. The Judge, remarking that the accounting was between the Receivers and the Prudential, delivered copies of said accounts to Davis Harrison requesting that they be sent to the Prudential for auditing. Hence, it is apparent that the accounts of the Receivers were actually delivered to the Court at the time stated by the Exceptors in their second exception as a reasonable time.

The evidence further shows that Mr. Harrison took the copies back to his Indianapolis office with him and he testifies that about four months later the Prudential had finished with them. However, the Prudential was objecting to the charges made by the Receivers, upon the sole grounds that such charges were excessive. Mr. Harrison was placed in an embarrassing position which both he and his Honor, Judge Hough, might well have foreseen. Mr. Harrison found himself holding copies of accounts to be filed by his clients, the Receivers, with instructions from his other clients, the Prudential, to object to those same accounts. He attempted to solve the problem by holding the copies in question and attempting to work out some agreement whereby his own further embarrassment might be avoided.

There is further testimony that the matter was taken up with Judge Hough by the Receivers in January, 1935, and

the record shows rather bitter correspondence between O. C. Ingalls and Davis Harrison regarding the return of the reports. This correspondence began with a demand by Mr. Ingalls in September, 1936, and continued up to January 26, 1937.

In view of the foregoing, the entire matter may be summarized as follows: The Receivers were appointed February 17, 1932; the judicial sales occurred July 1, 1933; confirmation July 18, 1933; the last transactions of the Receivers were completed April, 1934; their reports were delivered to Judge Hough in the same, or the following month, and by Judge Hough directly referred to the Prudential for auditing. In January, 1935, Judge Hough was contacted by the Receivers, but the Court had not yet been advised by the Prudential and the matter remained in status quo. In the opinion of the Master, both the Court and the Master are entitled to take judicial notice of the fact that soon thereafter, Judge Hough suffered an accidental injury which was followed by serious illness, culminating in his death in November, 1935. His successor, Judge Underwood, was not inducted until April 11, 1936, and for the considerable period during the incapacity of Judge Hough and the subsequent vacancy, the Receivers knew nothing of their reports except that they had been delivered to Judge Hough and not yet approved by the Prudential. A subsequent search revealed the fact that the original reports could not be found, and in September, 1936, Mr. Ingalls began his efforts to secure the copies from his co-counsel, Mr. Harrison, with or without the approval of the Prudential. This continued up to January 26, 1937, and on February 19, 1937, new accounts were filed by the Receivers.

Under the conditions, it does not appear that the Receivers were guilty of any culpable negligence in the matter, or that they were unduly neglectful.

It may be considered that the appointment of the Receivers, alone, imposed upon them the duty and obligation to make proper and timely reports and accounts; but it may well be considered also, that in the absence of such reports or accounts, any proper party to the cause could, and should have, appealed for relief, when such relief could have been effectively granted. It cannot be presumed

nor taken for granted, that the delay in this respect resulted in any loss to the Exceptors; certainly the entire absence of an account is more conspicuous, more uncertain and more fraught with danger of fraud than any thing likely to be found openly set forth in the account. The record clearly shows that Crites, Inc., had not been aggressive in the proceedings and that Judge Hough, had considered the matter one between the Receivers and the Prudential. Since the Exceptors took no steps to compel an accounting or to assert their interest, it cannot be presumed that if an account had been made at an early date they might have become interested at that time; that they might have found something upon which they might have acted to their own advantage. Where is the assertion of their interest in these cases, either in the form of answers or otherwise, prior to the filing of these exceptions? It is apparent that the Exceptors took no open or active interest in these cases until after the filing of said accounts of February 19, 1937.

The Master therefore, finds that the first and second exceptions, as exceptions to the accounts are not well taken and that the same should be overruled and dismissed.

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“Credits for disbursements (other than those for the compensation of the receivers and their attorneys as ordered by the court on January 14, 1933, the payment of taxes and insurance premiums for fire and tornado insurance) were not authorized by any order of this court and are not shown to be necessary or proper for the preservation of the property and should not be allowed; which credits include more particularly those credits for stenographic fees and services made on March 18, 1932, December 31, 1932, and November 15, 1933 and April 16, 1934, and also the expenses of December 31, 1932, and on November 15, 1933, to each of said receivers.”

Information regarding the items herein objected to can best be gained by direct reference to the accounts. It is there revealed that the items have to do with the stenographer's services which also, in some instances, includes

telephone bills; and to the payments made by the Receivers to themselves as the \$100.00 each, per month expense allowance which they contend was granted by Judge Hough, but for the payment of which no written order exists.

The items in question will be briefly summarized on the following page by showing the case number of each particular farm, the amount of stenographer's charges against that farm, the amount of Receivers' expense payment charged against the farms individually and the amount reported by the Receivers as charges against themselves.

Case No.	Stenographer's Charges	Receivers' Expense Charges	Charges in Account Against Receivers
927	\$70.00	\$180.00	\$2,308.69
928	67.90	180.00	5,375.96
929	84.88	225.00	3,158.84
930	50.90	135.00	2,040.92
931	118.82	315.00	4,602.85
932	67.90	180.00	2,425.27
933	33.90	90.00	1,433.11
934	135.80	360.00	5,315.84
935	186.72	495.00	7,575.61
936	51.53	135.00	2,346.51
937	67.90	180.00	2,517.83
938	84.88	225.00	3,257.42
939	84.87	225.00	2,983.54
940	50.93	135.60	2,126.07
941	33.95	90.00	1,529.23
942	84.87	225.00	2,501.10
943	50.93	135.00	1,415.84
944	33.95	90.00	965.44
945	118.82	315.00	2,970.32
946	101.85	270.00	3,360.22
947	50.93	135.00	2,546.98
948	67.90	180.00	2,003.78
Totals	\$1,701.13	\$4,500.00	\$64,761.37

With regard to the charges for stenographic services, it appears from the record that the payment thereof has never been authorized by any specific order of Court. With regard to the expense money for which credit is claimed

by the Receivers as having been paid to themselves, the record shows by the testimony of three witnesses that Judge Hough did in fact ~~make that allowance~~ to the Receivers. It is true that the allowance of Judge Hough was never made a matter of record and for this reason, is not binding upon the present Judge. However, it would seem that in the light of positive evidence in support of the allowance and in the total absence of contradicting evidence, that we are entitled to consider that Judge Hough did in fact grant the allowance of \$100.00 each to the Receivers as a monthly allowance for traveling expenses and those items associated therewith. In the opinion of the Master, this determination on the part of Judge Hough, even without a formal order, is entitled to great weight and the Master accords it that weight in this consideration.

The Receivers in this action were appointed February 17, 1932; the Marshal's sale was held July 18, 1933 and their active duties did not terminate until April, 1934. During the course of the receivership they were in active and direct charge of the leasing and operation of 22 farms, through a very difficult period in farming history. The size of the farms is not readily ascertained but the record shows that the 11 situated in Madison County totaled between four and five thousand acres. Both the court and the Master are entitled to take these matters into consideration and to recognize the fact that such a business operation must involve considerable correspondence, drafting of leases and contracts, handling of records, checks, vouchers, telephone calls, office calls and the usual activities incidental to such operation. The fact that such claimed credits have never been allowed or authorized by this Court is no bar to considering them at this time and allowing them if found proper and reasonable.

In the opinion of the Master the charges outlined on page 9 hereof are not unreasonable and it would appear that in general they have been fairly apportioned among the various farms. It does not appear from the evidence that they are duplications or that they have been directed against any particular farm or farms without due cause therefor.

The Master, therefore, finds and holds, that the third exception should be overruled and dismissed and so recommends to the Court.

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"Credits for the payment of the expenses of the receivers are excessive, improper, duplicated and are not authorized by any order of court, and should not be allowed, the payments having been made without notice to, or the knowledge of Crites, Inc.; which credits include more particularly those credits for stenographic fees and services and telephone services made on March 18, 1932, December 31, 1932, November 15, 1933, and April 16, 1934, and also the expenses of December 31, 1932, and on November 15, 1933, to each of the said receivers."

All that has been said in connection with the third exception is equally applicable to this objection. In addition thereto, it may be said that Crites, Inc., was named a party defendant in these proceedings for the purpose of requiring them to set up their interest. The Master is unable to find that Crites, Inc., ever did so and under those circumstances is unable to understand why there should be any obligation upon the part of the receivers to advise them. That, however, is beside the point; the Receivers are now claiming credit for such payments and the Court is asked to authorize the allowance of such credit. Crites, Inc., has been fully heard upon the subject and hence have been denied no right of hearing.

The Master finds and recommends that the fourth exception should be overruled and dismissed.

"No vouchers or receipts are filed with the account showing payment of the items for which credit is taken in the account."

This exception is not in itself fatal to any account. It is of course better practice for Receivers to file vouchers or receipts for expenditures amounting to more than petty cash disbursements; or at least to be able to produce them if and when called upon. The circumstances in this case, however, indicate a good and valid reason why such receipts or vouchers could not be produced. The record shows without contradictory evidence, that the receipts were taken

by the Receivers; that they were by the Receivers brought to Columbus and delivered to Judge Hough with the first accounts; that while in the possession of Judge Hough they were lost or mislaid. It would appear that the Receivers did all that could rightfully be required of them in this respect.

The Master, therefore, finds and recommends that the fifth exception should be overruled and dismissed.

—6—

"Said account is incomplete in that the records kept and maintained by the Receivers were not complete or adequate and do not truly reflect the transactions of the Receivers and do not warrant any cost of them for the cost of keeping said records; and in that the books maintained were so incomprehensive that no intelligent report can be made therefrom and no separate or detailed allocation of the expenses could be made to the respective parcels of real estate in the respective causes; in that said account purports to be only of receipts and disbursements; in that said account fails to distinguish between items of farm income and receipts from tenants in repayment of loans; in that said account fails to distinguish between loans to tenants and farm expenses; in that said account fails to set forth what loans were made, repaid and not collected, whether the same were secured or unsecured, and the reasons for the failure to collect the same; in that the same does not set forth the disposition of a check from the Home Insurance Company in the amount of \$2,200.00 by compensation for loss of a barn on one of the farms in these causes; in that the items for taxes do not show for what years' taxes the said payments were made; and in other particulars as appears upon the said account of said receivers."

With regard to this exception, the Master is compelled to say that the records kept by the Receivers were neither the best nor the most complete that might have been kept, but taken in connection with the evidence, the Master is of the opinion that intelligent reports can be made therefrom and that a separate and detailed allocation of expenses based upon the value of the farms has in fact

been made. Better records could be desired, but worse records have been kept by many receivers.

The Master is of the opinion that the check from the Home Insurance Company has been satisfactorily explained. As a matter of fact, the check, as shown by the evidence, was received by the Receivers and payment stopped. There is evidence to the effect that payment was later made to the Prudential Insurance Company; but by the amended account filed by the Receivers, that item is shown to be outstanding and possibly subject to collection under orders of this Court.

As to the failure of the accounts to properly reflect the loans and advances made by the Receivers to tenants; the exception is well taken. The account books of the Receivers furnish this information and the Receivers should be required to so amend their accounts, or to file supplemental accounts showing the facts in this connection.

It is not believed that the failure to specify the years for which taxes were paid can be considered as fatal to the accounts in the absence of any showing that taxes improperly paid, inasmuch as the taxes would constitute a burden upon the land until paid and the Receivers were authorized to pay them. It would appear that neither the Court nor the Master can be required to assume that any payment of taxes by the Receivers was improper. It should be possible, if taxes were improperly paid, to discover that fact and to present direct evidence thereof.

The Master finds and recommends that the sixth exception be sustained insofar as it applies to the failure of the Receivers' accounts to reflect the actual facts in connection with their loans and advancements to tenants; further, that said Receivers be required to complete their reports in this respect.

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"That credits should not be allowed for bookkeeping and clerical expenses, because the records were so inadequate and incomplete and because credits are being claimed for bookkeeping and clerical expenses after the necessity therefore had ceased."

To grant that this exception is properly taken would be to hold that no clerical services were rendered herein with the exception of bookkeeping. Upon the face of the ex-

isting circumstances, this cannot be true. As before stated, better records have been kept, but the records in these cases are not so incomplete or lacking in information that they need be, or should be, considered valueless. Taking into consideration the other clerical work which was necessarily involved, the Master is of the opinion that reasonable compensation is allowable therefor.

As to the other phase of the exception, that credits are being claimed for clerical expense after the necessity therefor had ceased, the evidence will show that no payments of this character were made after November 15, 1933, until April 16, 1934, when \$62.00 was claimed for the 22 farms covering the entire period. The record will further show that the credit claimed on November 15, 1933, covered the 22 farms for the period from December 31, 1932, until November 15, 1933. It is further shown that the final transactions of the Receivers occurred at or near the same time as the final credits are claimed. It is true that the farms were sold on July 18, 1933, but it is equally true that the Receivers' duties had not ended. The Master is of the opinion and holds that such expenses were reasonable and proper.

It is, therefore, recommended that the seventh exception be overruled and dismissed.

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"That the said receivers should be charged with all loans made to tenants to the extent the same were not repaid, no authority having been granted by any court order to make loans to tenants and no showing having been made why the unpaid loans have not been paid."

This exception the Master is not in position to pass upon at this time and so reports to the Court. The facts with regard to such loans or advances have not been produced fully and to the extent indicated by the account books of the Receivers. Neither are they reflected in the accounts. It is, therefore, recommended that this exception be held under consideration until the Receivers have completed their accounts as recommended under exception 6.

"Said account does not include all receipts of fees, compensation, remuneration or commissions received

by the receiver or receivers in connection with the administration of the receivership and in connection with property in the custody of said receivers."

In this connection, it is the intention of the Master to report to the Court the facts as shown by the record with regard to each of the individuals named in the exception.

George Florence, Receiver, apparently had no connection with the Proctor transaction and the record does not indicate that he shared any allowance to him with any other party, or that he shared in any allowance made to any other person.

Richard Simkins, Receiver, entered into an agreement with O. C. Ingalls, attorney for the Receivers, that the fees received by them in the case would be equalized between them. Mr. Ingalls testified that he paid Simkins \$275.00 and Simkins testified that he received \$500.00 from Ingalls. It appears that the money given by Ingalls to Simkins was not paid through this Court but was a part of a fee paid to Ingalls by the Prudential as attorney for that company. The other money received by Simkins was the sum of \$2,797.00 received from Jones for his assistance in the Proctor sale. The agreement between Ingalls and Simkins was not kept by Simkins according to the evidence, in that Simkins never paid Ingalls any part of his receipts. However, Simkins did pay or cause to be paid to Davis Harrison the sum of \$1,000.00, \$500.00 of which was paid directly and \$500.00 of which was paid by the Prudential upon Simkins' order. It does not appear from the evidence that any part of the money paid to Harrison by Simkins came from the receivership, but it does appear that in all probability the \$500.00 paid directly was a part of the fee paid by Jones to Simkins.

O. C. Ingalls, attorney for the Receivers, apparently received nothing by way of division of fees. He did receive \$1,100.00 from the Prudential as their attorney in these cases. This fee he shared with Simkins and received nothing in return.

Davis Harrison, attorney for the Receivers, received \$1,000.00 from Simkins as stated above. Apparently he did not share any of the money received by him with anyone else.

These are the facts disclosed by the record with regard to fees and compensation not disclosed by the accounts of the Receivers, and which, as the Master understands, this exception seeks to have made a part of the accounts. Unless it should be determined that the various parties should be held accountable to the estate therefore, and the Master does not so hold, there appears to be no impelling reason why they should be in the accounts. They are a matter of record and can of course be given such consideration as the Court may deem necessary.

The Master, therefore, finds and recommends that the ninth exception should be overruled and dismissed.

Exception 10 states the most serious contention advanced by the Exceptors. A great many of the other exceptions made depend upon the decision made in 10. For the reason stated, it is proposed to deal with this particular item fully and in detail.

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"Said account is incomplete in that the receiver, Simkins, does not charge himself with fees, compensation or commissions which were received by him from one E. F. Jones of Washington Court House, Ohio, and from O. C. Ingalls, which fees, compensation and commissions were received by him while receiver of the real estate in this cause, and not disclosed in said report and received by him without any order of court allowing the same to him."

The evidence in this case shows that Richard Simkins, Receiver herein, did prior to the date of the sale held by the United States Marshal, enter into an agreement with Mr. E. F. Jones of Washington Court House, Ohio, whereby Mr. Simkins agreed to assist Mr. Jones in securing title to the eleven farms located in Madison County, Ohio, from the Prudential Insurance Company of America, when the Prudential had secured title to said farms. It appears that Mr. Jones was a real estate agent who was at the time representing the Proctor Interests in Mr. Simkins' words Mr. Jones employed Simkins to "represent him."

Whatever the arrangement may have been, there was a contract drawn up between Mr. Jones and Mr. Simkins wherein the latter agreed to assist the former in the

matter. It is apparent also, that on June 25, 1933, at the request of Mr. Jones, Mr. Simkins attended a meeting in a local hotel, where various representatives of the Prudential Insurance Company were conferred with, regarding the possibility of purchasing the Madison County Farms. No definite arrangements were made at that time, and it was not until June 27, 1933, that Jones submitted a written offer to the Prudential and gave a certified check in the sum of \$3,000.00 to support his offer. (A copy of said offer is contained in the record following page 174, and attached to Exhibit 4.) The evidence clearly indicates that Mr. Simkins was active in assisting Mr. Jones with his transactions in connection with arrangements to purchase the property from the Prudential. It is also clear that Mr. Simkins was active in completing the transaction by which the client of Mr. Jones became, by purchase from the Prudential after the Marshal's sale, the owner of the Madison County lands containing more than 4000 acres. There is no disputing evidence of any character as to these facts; Mr. Jones and Mr. Simkins both admit them.

The record shows that for his services Mr. Simkins received a total of \$2,797.00 from Mr. Jones; \$500.00 of which was paid on July 3, 1933; \$1,000.00 on July 8, 1933; and \$1,297.00 on August 18, 1933. It is indicated that possibly \$200.00 of the total amount was not paid on account of this transaction, but on account of other legal services performed by Mr. Simkins for Mr. Jones.

The question squarely presented for answer is whether or not Mr. Simkins was guilty of any violation of his trust or duty in accepting the employment with Mr. Jones and in receiving compensation therefor. The Exceptor contends that it was in violation of the trust; the Receiver, Mr. Simkins, that there was no conflict of interest and no violation of trust.

In support of their contention the Exceptors cite many cases, but unfortunately several of them are state cases from states other than Ohio and for that reason, can have but little weight in deciding the question at hand. However, for the convenience of the Court, the Master will give the citations herein with a brief comment by the Master to show the nature of the case.

Re Sheets Lumber Co., 27 S. 809; a Louisiana case decided in 1900. It was held that the act of a receiver in buying at his own sale, though conducted by a sheriff, constituted a violation of the trust. However, in this case, the receivers were in charge of the corpus of the estate. The Court in referring to the time within which accounts should have been filed said: "The receivers had thus sold all the property which had been intrusted to them, and had received the price." The order of sale was issued upon application of the receivers and "they received the price," clearly they were directly interested and at least partly in control of the sale.

Jewett v. Miller, 10 N. Y. 402. A liquidating receiver was held to have violated his trust by taking a quitclaim deed from the mortgagors and buying in the property at the sale when the bank held a second mortgage. Here again it was a case of a receiver charged with sale of the corpus.

Herrick v. Miller, 123 Ind. 304; 24 N. E. 111, Decided by the Supreme Court of Indiana 1890. A receiver for the rents and profits was appointed during the pendency of the action to retain the property during the period of a year within which redemption might be made. The receiver purchased the land and sought to retain the rents and profits. The Court held that the rents and profits belonged to the plaintiff and that the receiver could not purchase for himself. Hence, the sale was void as between the parties. It is not shown that the sale was made nor that the receiver did or did have control over the sale.

Donahue v. Quackenbush, 77 N. W. 141, decided by the Supreme Court of Minnesota. The receiver took possession of all the property of a defendant in a divorce case with power to control the same and receive the rents and profits. The defendant was an incompetent and by arrangement with the plaintiff wife, the receiver procured an assignment to himself of a judgment against the defendant husband, thereafter causing the land to be sold on execution. At that sale the receiver bought land valued at \$4,000.00 for about \$400.00. It is to be noted that in this case, the receiver was the party who caused the execution sale.

Shadewald v. White, 77 N. W. 42. An action was brought by the plaintiff to force the receiver to perform a contract made in his individual capacity, but dealing with the trust property. The plaintiff was a majority stockholder in a corporation owning a mill against which there were three mortgages. Plaintiff and defendant agreed together that plaintiff would induce the holder of the first and second mortgages to foreclose. That plaintiff would secure the appointment of defendant as the receiver; that plaintiff should thereupon take charge of the mill for defendant as receiver; that defendant should furnish money and credit to carry on the business and advance money with which to purchase the foreclosure certificate in his own name; that thereafter they would jointly operate the mill until the profits were sufficient to repay the defendant for his advances, the purchase price, and \$2,000.00 due him as holder of the third mortgage. That thereafter the defendant would convey the premises to the plaintiff free and clear. The court held that such a contract embodying the relinquishment of the powers of the receiver and a purchase by him, could not be enforced.

North Baltimore Building Association v. Caldwell, 25 Md. 420. A single quotation from the case will show wherein it differs from the present case. The court said:

"The single question in this case is, whether it is compatible with the duty of a trustee appointed by decree of a court to sell real estate, to bid for and purchase the property for a third person at a public sale under the same decree."

It was held incompatible. Never can a buying trustee in any capacity be also a selling trustee of the same property.

Harrison v. Manson, 29 S. E. 420. The case is best explained by the second syllabus which reads:

"A purchaser by a trustee from himself, or as agent for another, of land sold by himself as trustee under a trust deed, is voidable. Even though there was no moral turpitude on his part and the price paid was a fair one."

In this case the purchase was by a trustee who forced the sale under his powers as trustee under a deed of trust.

Zinc Carbonate Co. v. First Nat. Bank of Shullsburg et al., 79 N. W. 229. This case is one dealing with outright fraudulent transactions among stock holders operating to make a profit directly out of their representative capacity at the expense of their fellows.

The following are Federal cases cited by the Exceptors.

Lane v. Maple Cotton Mill, 232 Fed. 421. The directors of the corporation being the liquidating officers of their company, bid in the corporate property at their own sale; thus placing themselves in the dual position of buyers and sellers. This the court held to be a breach of trust.

Michoud v. Girod, 4 How. 503; 552; *i. e.*, 45 U. S. 503; A case in which executors under a will purchased the entire estate of their decedent at their own sale through nominal third parties who paid nothing; which as the court said was fraud upon its face.

Magruder v. Drury, 235 U. S. 106, 119, 120. A case in which the trustees invested trust funds of the estate through their own firm and claimed commission thereon in the firm name. Under the circumstances it was held that the trustees could take no profit on the transactions though beneficial to the estate.

Richards v. Holmes, 18 How. 143, 148; *i. e.*, 59 U. S. 143. A case in which the creditor, through the Trustee, instructed the auctioneer to place a bid for the creditor. This was held to be neither inequitable nor illegal. The case has no particular value here except for a short discussion of the principles upon which the decision is based.

Smith v. Black, 115 U. S. 308, 315. This case also is of value here only in that it contains some discussion of principles. It deals with a trustee's sale to the creditor at public auction and the sale was upheld.

Jackson v. Smith, 254 U. S. 586. A receiver for a bank, which bank held a note secured by a deed of trust, entered into an agreement with counsel for the receiver and another attorney, whereby they agreed to purchase at the judicial sale held by the Trustee under the deed of trust. The Supreme Court held that the receiver "had the affirmative duty to realize the largest possible amount from the note." That "to this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. That when the receiver agreed to

join in the purchase, "he placed himself in a position in which his personal interests were, or might be antagonistic to his trust." It became to his interest that the purchase should be for the lowest possible price."

Baker v. Schofield, 243 U. S. 114. A bank receiver sold certain assets of the bank at private sale, properly confirmed, to a third party who was acting secretly for the receiver. The transaction was held to be a breach of trust, in that the receiver was both buyer and seller.

Robertson v. Chapman, 152 U. S. 114, is a case in which an agent to sell did make a bona fide sale to a third party and thereafter purchased on his own account, subsequent to the termination of the agency. The case is remarkable chiefly because the syllabi are all statements of law of agency which has no application to the facts of the case and it is so stated.

None of the Federal cases cited by the Exceptors are directly in point in the instant case, and the state cases cited are, of course, not authority in this Court even though one could be found that would apply to the facts and circumstances. In no case cited, either state or Federal, is there a situation like that involved in the instant case, nor is there any ruling or precept advanced by the courts therein suitable for direct application in this case, except as they express general rules which may or may not be applicable in this instance. Insofar as the *Lane v. Maple Cotton Mill*; *Michoud v. Girod*; *Jackson v. Smith*; *Baker v. Schofield*, and *Magruder v. Drury* all go to the point that fiduciaries cannot buy the trust property which they are required to sell; that they cannot be both buyer and seller. Although the case of *Magruder v. Drury* is a variation in form, the principle is still the same.

The other Federal cases cited; *Richards v. Holmes*, and *Robertson v. Chapman*, are instances in which the acts done were sanctioned by the courts.

The Master may state that he has not been able to find authority directly in point but for the information of the Court will cite some additional authority which is at least of some importance by way of analogy in that this line of authority shows a relaxation of some of the general rules under proper circumstances.

In the case of *Starkweather v. Jenner*, 216 U. S: 524, the Supreme Court held that:

"The rule that equity may convert into a trustee a co-tenant who attempts to buy an outstanding hostile title does not apply where the common property is sold at a bona fide public sale under legal process or power in a trust deed. At such a sale, and in the absence of fraud or deceit, any of the co-tenants is as free to buy as any of the general public, and several of the co-tenants may combine without notice to the others to purchase for themselves."

Clearly our Supreme Court has seen fit to distinguish between the cases wherein the party under disability acts in connection with a judicial sale over which he had no control and other cases where the sale is controlled by the party under disability. This case cites with approval the earlier case, *Twin-Lick Oil Co. v. Marbury* in which a director of a joint-stock company became a creditor of his own company and caused a sale through a trustee who was appointed under the trust deed. The director bought at the sale. In speaking of his relationship to the company, the Court said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary party whose interest is confined to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received recognition in this court and others."

Yet in this instance the sale was not disturbed by the Court for the reason expressed by it:

"If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which subsequent purchase under the deed of trust is not equally so. *The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted.* • • •"

Clearly the Court announced a principle that one leaving

no control over a sale conducted independently, is not under a positive disability.

In the *Starkweather Case supra*, the Court said:

"Even a trustee has been held competent to purchase trust property at a judicial sale, which he had no interest in, nor any part in bringing about, and which sale he in no way controls. (*Twin Lick Oil Company v. Marbury*, 91 U. S. 587; *Allen v. Gillette*, 127 U. S. 589)."

In the *Allen Case* the Court commenting upon the rule laid down by text writers said:

"It is true that the rule upon this subject as stated by some text writers is more stringent than that stated in these cases. * * * We think, however, that the language employed by them does not present a perfect generalization of the essential principles pervading the decisions upon this subject." * * *

Again these decisions would appear to be based clearly upon the principle that a party under disability may not be under disability to purchase or deal with the trust property where there is an independently conducted sale.

In the case of the *Pewabic Mining Company v. Mason*, 145 U. S. 349, the Supreme Court held:

"When a corporation owning real estate is wound up by reason of the expiration of the term for which it was incorporated, and its real estate is sold by decree of court under directions of a master, stockholders may purchase it, and there is no fraud on other stockholders if a part of the stockholders combine to purchase it for the benefit of an adjoining property owned by them."

It would seem that the basis of the decision is clearly that there was an independently conducted sale. The comment made by the Court in its opinion is instructive, quoting directly therefrom:

"A sale made by a special master under the directions of a court of chancery is not a sale made by either of the parties to a litigation or under his direction. The master is a representative of the court, as a marshal or sheriff is in an action at law. He is not under the control of either party; he is not the

agent or either party to make the sale. At such public judicial sale, either party as a rule may bid. (*Richards v. Holmes*, 18 How. 143; *Smith v. Black*, 115 U. S. 308; *Allen v. Gillette*, 127 U. S. 589; *Smith v. Arnold*, 5 Mason 414, 420.) In that case Judge Story said: 'In sales directed by the court of chancery, *the whole business is transacted by a public officer, under the guidance of the court itself*. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed'."

In the case of *Anderson v. Messinger*, decided by the Circuit Court of Appeals, Sixth Circuit, June 5, 1906, (146 F. 929) it was held:

"The rule that a pledgee who is a trustee cannot become the purchaser at his own sale of the pledge is inapplicable to a judicial sale conducted by an officer of the law."

In *Steinbeck v. Bon-Homme Mining Co. et al.*, 152 F. 333 the third syllabus reads:

"There is an exception to the general rule. It is that an agent or trustee may lawfully buy the property of his principle or cestui que trust at a judicial sale caused by a third party, which he had no part in procuring and over which he has no control."

Coming now directly to the consideration of the question herein presented, it is necessary first to refer to the order by which the Receivers, Simkins and Florence, were appointed. That order provided:

"to collect the rents and proceeds to the real estate described in the second cause of action in plaintiff's petition herein and/or to operate and manage said real estate, through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises, and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the Court."

It is elementary that this order both describes the duties of the Receivers and constitutes the fountainhead of their powers. It is clear that no power nor duty in connection

with the sale is imposed by the order. It is fairly interpreted by the Exceptors in their brief in the following words, saying that the receivers were "responsible for the care and control thereof, and collecting the rents, incomes and profits thereof," and again speaking of the Receiver Simkins, it was his "duty so to preserve, control and manage the property in his custody that, if it were sold, the fair value thereof could be realized on the sale." It is not contended even by the Exceptors that the Receivers were anything more than receivers to collect the rents and profits and to exercise the powers incidental thereto.

It is contended by the Exceptors, however, that Mr. Simkins violated his trust by his agreement with Mr. Jones wherein he undertook to assist Jones in purchasing the property from the Prudential.

It is unquestionable that this contention cannot be based upon the theory that Simkins was both buyer and seller. No matter what his relationship with Jones may have been, Simkins was not a seller. The action was begun and prosecuted by the Prudential Insurance Company of America; Simkins had no control over that. The Marshal was ordered by this Court, Judge Hough presiding, to conduct the sale. By order of the Court the Marshal was directed, when and how to sell and what to do with the proceeds. Confirmation was made by the Court upon application of the Prudential. There was absolutely no control over the sale vested in the receivers. The Court had not instructed them to take any part in it and another officer of the Court acting independently of the Receivers was instructed to fully by the Court in that regard. Any action taken by the Receivers in the Marshal's sale would have been that of interlopers.

Following the same line of reasoning suggested by the Supreme Court cases cited above; here, an independent officer of the Court inserted between the receivers and the subject matter of the sale.

Then can it be said that the Receiver Simkins by his contract or agreement with Jones derived a profit from the subject matter of the Trust? If, being a receiver of the rents and profits, he had profited by a transaction involving a lease, the sale of corn or a like part of the trust confided

to him, clearly he would have profited by the trust. But the thing sold at the Marshal's sale was not anything that had ever been confided to the Receivers. It was the fee in the land. The Receivers could not have sold it without the Court order that was never issued empowering them to do so. There is but one more possibility. Was Simkins employed by Jones because he was a Receiver in the case? Jones testified that he went to Simkins because Mr. Simerman, a Prudential representative, told him that Simkins was one of the attorneys in the case. To imply that Simkins, by virtue of being Receiver, could in any manner affect the Marshal's sale would be to impute irregularity to the office conducting the sale, and the Exceptors do not so infer. Jones was interested in but one thing, and that was to secure the title to the land from the Prudential Insurance Company. If that were his purpose, and he could have had no other, he must have gone to Simkins and paid him, not for his influence as a Receiver, or any influence that he might exert at the Marshal's sale, but because he thought that Simkins could exercise his influence with the Prudential, and his inference in that respect was perhaps quite logical; he was sent to Simkins by the Prudential, certainly the Prudential knew that the Receivers as Receivers, were not conducting the sale. Possibly the Prudential might complain of the course pursued by Mr. Simkins and his use of his position but they have not done so. But since it was his influence with the Prudential and not as a Receiver that was bargained for, there was in that respect no violation of the trust imposed in him as Receiver.

There remains but one ground to be considered in determining the question of the breach of trust; that is, did the Receiver Simkins, by his agreement with Jones, put himself in a position where he was representing conflicting interests with respect to his receivership? His duty to the receivership, as expressed by the Exceptors, was to collect the rents and profits and "so to preserve, control, and manage the property in his custody that, if it were sold, the fair value thereof would be realized on sale." Could the fact that by his private contract, he was bound to assist the Proctor Interests in buying from the Prudential cause him to desire that the value of the

land insofar as it was controlled by him, be depreciated? According to the testimony, the Prudential had determined that it would be required to buy the land in order to protect its interests. The fact that the Prudential knew through the combined efforts of Jones and Simkins that it could sell the land at a considerable increase in price would certainly have no tendency to cause the Prudential to bid less. Neither would Simkins have a personal interest in depreciating the value of the land. It was to his personal interest that the Prudential buy and that the Proctor Interests would find the condition of the land to be such as to justify the price. The Master is unable to see any reason why the fact that one of the Receivers entered into a contract with Jones to help him buy from the Prudential would in any manner cause Simkins to take any action adverse to his receivership trust during the short time intervening between the agreement and the sale.

In view of the foregoing, the Master finds that the Tenth Exception should be overruled and dismissed. In so doing, the Master is of the opinion that the conduct of Receiver Simkins was objectionable in that it was open to, and did cause criticism which, as an officer of this Court, it was his duty to avoid; but that under the circumstances, such conduct constituted no violation of his trust which would justify action by this Court in the manner requested by the Exceptors herein.

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"No credits should be allowed to the receiver Simkins for any compensation whatsoever to him for his services because of his misconduct and for his violation of his duties and obligations as receiver and because of the matters and things in these exceptions set forth."

This exception is based mostly upon Exceptions 9 and 10. In this connection, the Master has found that the Receiver Simkins was not guilty of any breach of conduct or trust herein, which would bar him from claiming or the Court from allowing him a reasonable compensation for his services herein. The Master, therefore, finds and

recommends that this exception should be overruled and dismissed.

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“No credits should be allowed either of said receivers for compensation to the attorneys, or any of them, of the said receivers, and no compensation should be payable to the receivers’ attorneys because of the misconduct and the violation by the said attorneys of their duties and obligations of the matters and things in these exceptions set forth.

The first contention of the Exceptors is that “No credits should be allowed either of said receivers for compensation to the attorneys, or any of them, of the said receivers.” This apparently has reference to the sum of \$250.00 paid by the receivers to Mr. Ingalls and Mr. Harrison for which credit is claimed in the Receivers’ accounts. This allowance was made by an order of Judge Hough, dated January 17, 1933. Since it was made by the Court and the Receivers paid under that order, the Master is of the opinion that the order of the Court was, and is a complete protection to the Receivers and that an exception to the accounts founded upon such payment is not well taken and cannot be sustained.

The second part of the twelfth exception asserts: “and no compensation should be payable to the receivers’ attorneys because of the misconduct and the violation by the said attorneys of their duties and obligations and because of the matters and things in these exceptions set forth. Apparently reference is here made to claims by the attorneys for allowance not yet paid by the Receivers nor contained in their accounts. The Master is of the opinion and holds, that this question is not properly presented for determination by the exceptions filed to the Receivers’ accounts; inasmuch as the Receivers claim no credit for future payments to be made to such attorneys. If such credits were claimed, it would of course be proper to raise the question by exceptions to the accounts; otherwise, it can be properly raised only by exceptions or objections to the application for fees made by or on behalf of the attorneys.

The Master, therefore, finds and recommends that the Twelfth exception be overruled and dismissed.

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"The said Richard Simkins as receiver in cases numbered 927, 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 should be charged, in addition to the above, the sum of \$56,000.00 by reason of the loss to this defendant, Crites, Inc., occasioned by the acts and misconduct of the said receiver Richard Simkins in combination and conspiracy with the plaintiff and with said E. F. Jones acting for and in behalf of one William Proctor as is more fully hereinafter set forth."

To arrive at this conclusion, it is necessary to accept as true some of the foregoing exceptions which the Master has held to be not well taken. It has been found in those instances that the Receiver Simkins has been guilty of no misconduct or breach of trust which would justify the relief requested by the Exceptors. It is not deemed necessary to offer any extended discussion of this exception in view of the determination made as to the preceding exceptions and in view of the following discussion as to the points raised by the Exceptors in support of said exceptions. (Being points raised in the memorandum attached to the exceptions as a part thereof.)

The Master, therefore, finds that the thirteenth exception should be overruled and dismissed.

It is now proposed to consider the supporting arguments advanced by the Exceptors.

It is stated by the Exceptors that there was an arrangement between Simkins, Harrison and Ingalls whereby there was to be a division of fees among them, also that Simkins was to be Receiver and that Harrison and Ingalls were to be counsel for the Receivers. There is no doubt but that there was a mutual understanding between the parties referred to, by which it was agreed that they should be proposed for appointment as alleged. Likewise, there is no doubt that at least Ingalls and Simkins agreed to share their fees and that in pursuance thereof, Ingalls did pay to

Simkins a substantial sum from his pay received at attorney for the Prudential. It is apparent too, that Ingalls did personally represent the Prudential; that Harrison also represented the Prudential and that Simkins had from time to time represented the same company. But these facts do not in themselves indicate any reason for a surcharge against either or both of the Receivers, nor do they of themselves require that this Court deny all compensation. The instant case is peculiar in that Judge Hough, apparently and without question, regarded the receivership as one for the benefit of the Prudential. Numerous circumstances shown by the record almost conclusively so indicate; Judge Hough knew that Harrison represented the Prudential; when the compensation of the Receivers was discussed it was between Judge Hough and Harrison; when the accounts were presented to Judge Hough he remarked that the accounting was apparently between the Prudential and the Receivers and delivered the accounts to Harrison to be audited by the Prudential. But there was no showing in the record that Judge Hough had any information as to the fee-splitting arrangement. To that extent, this Court and Judge Hough were imposed upon. In support of this statement, *Weil v. Neary*, 278 U. S. 160, is cited. In the *Weil* case the Court held that such an arrangement removed the fixing of fees from the jurisdiction of the court and placed it in the hands of strangers. That case held that a contract of that nature could not be enforced and was void as against public policy, irrespective of the particular rule involved in the case. However, the *Weil* case does not hold that the Court as a matter of course may not, under such circumstances allow some compensation.

It should be pointed out, in addition, that if Judge Hough were imposed upon and believed that the Prudential was the only creditor interested in the receivership, the defendant Crites, Inc., insofar as the record shows, stood idly by and by not asserting any interest it might have had, contributed to that belief. Crites, Inc., could not be held blameless in that respect. The prolonged silence on the part of that particular defendant leads the Master to the conclusion that Crites, Inc., was of the same opinion as

Judge Hough; that there was nothing in the receivership for them. That opinion evidences change only after the sales were completed.

It is asserted by the Exceptors that there was an agreement between Jones and Proctor that Jones might retain the difference between \$281,000.00 and any lesser sum for which the property might be purchased. This is not shown by the record. Other inferences are drawn as to the existence of a definite contract or agreement between the Prudential and Jones prior to the sale. The evidence shows only that Jones had previously approached the Prudential, both individually and through Simkins, attempting to make definite arrangement, but that he was repeatedly told that the sale must come first and that the Prudential would discuss terms after they had title.

Attention is directed by the Exceptors to the fact that Jones attended the Marshal's sale and relying upon an agreement with Prudential did not bid and that the Prudential bought for \$164,000. The record is uncontradicted to the effect that Proctor would not buy at a Marshal's sale; that he would buy only when he could be assured of securing the entire tract and when the title was supported by a warranty deed from the Prudential. Apparently, that is the reason Jones did not bid; his principal had not only made it clear to him that he would not buy at the sale but had also not authorized him to bid.

In view of the attitude of Colonel Proctor as shown by the record, it does not appear that he was in any sense of the word a prospect who might have bought at the sale or that he would have been interested in buying the land from Crites, Inc.; it is clear that a deed for some 4000 acres of land supported by the warranty of the Prudential might be an entirely different proposition from one supported by a warranty of Crites, Inc. There is no evidence here to support the allegation of any illegal conspiracy or a controlled bidding.

It is further alleged by the Exceptor in their arguments that all these details were concealed from the defendant, Crites, Inc., and the Court. Simkins' commission from Jones was not revealed but according to the undisputed evidence contained in the record, the Court, in the person

of Judge Hough, was advised of the offer as shown by the affidavit of Mr. Harrison filed in support of confirmation and his testimony that he had brought that circumstance to the attention of Judge Hough in open hearing. Likewise, Simkins testified that he had told Mr. Harlor, attorney for Crites, Inc., and Judge Hough that he had a buyer for the entire tract but was told that such a sale was impossible. Mr. Harlor was in the Court Room when that testimony was given, but he did not refute it by statement or testimony. All of which, in the conclusion of the Master, entirely refutes the allegation that the facts concerning the existence of the offer and the amount thereof were concealed from Judge Hough.

No improper motive on the part of Colonel Proctor having been shown, the Master is of the opinion that the terms of payment between him and Jones are of no importance here.

The assertion of Mr. Ingalls as to improper influence exerted at the sale to stifle bids as quoted by the Exceptors, loses its credibility in view of the sworn denial by Mr. Ingalls.

VI *The Application of O. C. Ingalls for Fees:*

On February 19, 1937, O. C. Ingalls, as one of two attorneys for the Receivers, filed his application herein asking compensation in the sum of \$1,200.00 and reimbursement in the sum of \$68.75. Thereafter, on September 29, 1937, he filed an application for an additional allowance of fees in the sum of \$300.00.

No exceptions have been filed in opposition to said applications, but on June 2, 1937, the Prudential Insurance Company of America filed its objections thereto. One of the principal objections being that the applicant had included in his application several items of service amounting to one hundred hours or more which represented service rendered by said applicant to the Prudential Insurance Company and for which said applicant had been fully paid.

The Master finds that the objection of the Prudential Insurance Company is well taken; that said applicant did include a great many items in his statement of services which could only have been rendered for and on behalf of the Prudential.

It is the finding of the Master, therefore, that said application for fees should be disallowed and the applicant required to file a new application setting forth his services in detail and making clear distinction between the services performed for the Prudential Insurance Company and those performed for the Receivers herein. It is so recommended to the Court.

VII *Findings of Fact and Conclusions of Law:
Accounts of Receivers and Exceptions thereto.*

EXCEPTIONS 1 AND 2

A. FINDING OF FACT:

1. That the Receivers were appointed February 17, 1932; that the last transactions of the Receivers took place about April 1934, and in April or May 1934, the Receivers delivered their accounts and supporting vouchers to Judge Hough, who then occupied the Bench of this Court.
2. That upon delivery of said documents to Judge Hough, a copy was delivered by him to Counsel for the Prudential Insurance Company and that Company was requested by the Court to pass thereupon.
3. That due to some dispute between the Prudential and the Receivers, the Prudential declined to take definite action in the matter.
4. That during the interval, the originals of the reports, and the only supporting vouchers which had been left with Judge Hough, were lost and have not since been found.
5. That accounts were filed by the Receivers on February 19, 1937 to replace those lost while in the possession of Judge Hough.
6. That the circumstances of this case do not show that said Receivers were guilty of any culpable negligence in the regard alleged nor that said Receivers were unduly neglectful.

B. CONCLUSION OF LAW:

1. That the mere fact that a receiver's account is filed after even an unreasonable delay, cannot

serve as the basis for rejecting the account or refusing approval and confirmation, if the account is proper in form and substance.

C. RECOMMENDATION :

1. That the First and Second Exceptions are not well taken and should be overruled and dismissed.

EXCEPTION 3.

A. FINDINGS OF FACT :

1. That the Receivers herein were appointed February 17, 1932; the sale held July 1933, and that the active duties of the Receivers did not terminate until April 1934.
2. That during the term of said receivership, the Receivers were in charge of the leasing and operation of 22 farms, during a period when such operation was extremely difficult.
3. That the credits claimed and objected to by this exception were never formally allowed by Judge Hough by any written order, but were informally and orally authorized by him.
4. That such informal allowance is not conclusive nor binding upon this Court, but is entitled to considerable weight.
5. That the charges objected to are reasonable and have been fairly apportioned among the various farms; that no duplications are apparent and no such charge has been made against any particular farm without due cause therefor.

B. CONCLUSION OF LAW :

1. That the fact that such allowances were never formally allowed by this Court is no bar to such allowance at this time, if found to be reasonable and proper.
2. That in view of the circumstances shown by the record, such charges are reasonable and proper.

C. RECOMMENDATION :

1. That the Third Exception should be overruled and dismissed.

EXCEPTION 4.

A. FINDINGS OF FACT:

1. That the expense claimed by the Receivers and objected to by this exception are not excessive, improper, or duplicated.
2. That such charges are proper and allowable herein.
3. That the Exceptor, Crites Inc., was named a party defendant in these proceedings for the purpose of requiring them to set up their interest; which the Exceptor did not do.
4. That the Exceptor apparently took no active part in these proceedings until exceptions were filed to the accounts in question.

B. CONCLUSION OF LAW:

1. That the mere fact that the expenses objected to were not heretofore formally authorized by this Court, or that they had not been authorized at all, is not a bar to such allowance at this time, if found to be reasonable and proper.
2. That under the circumstances existing herein, the Receivers were not required to notify said Exceptor of such expenditures in the absence of any request for such information.
3. That if such notice should have been given, the fact that it was not given has been rendered immaterial; since the Exceptor has had full opportunity to be heard upon the allowance herein claimed.

C. RECOMMENDATION:

1. That the Fourth Exception should be overruled and dismissed.

EXCEPTION 5.

A. FINDINGS OF FACT:

1. That the vouchers and receipts in question were delivered by the Receivers to Judge Hough and that said papers were lost while in his possession.
2. That under the circumstances, no neglect in said

respect, on the part of the Receivers, has been shown.

3. That under the circumstances, the Receivers have done all in this respect that could be rightfully required of them.

B. CONCLUSION OF LAW:

1. That the mere fact that vouchers and receipts are not filed with the account is not necessarily fatal to the approval of said account.
2. That the absence of such supporting vouchers has been fully and satisfactorily explained in the instant case.

C. RECOMMENDATION:

1. That the Fifth Exception should be overruled and dismissed.

EXCEPTION 6.

A. FINDINGS OF FACT:

1. That while the records kept by the Receivers were neither the best nor the most complete that might have been kept, taken in connection with the evidence, intelligent reports can be made therefrom.
2. That a separate and detailed allocation of expenses among the various farms has been made upon a reasonable basis insofar as can reasonably be required.
3. That the matter of the check in the sum of \$2,200. from the Home Insurance Company has been satisfactorily explained and is shown as an outstanding item on the accounts being considered.
4. That said accounts do not properly reflect the loans and advances made by the Receivers to tenants, but that said information appears in the books of account of the Receivers and should be reflected fully in the accounts.

B. CONCLUSION OF LAW:

1. That the failure to specify the years for which taxes were paid is not fatal to the accounts in the absence of any showing of improper payment.

2. That since payment of taxes was authorized and since such taxes were a lien upon the land, it cannot be assumed, in the absence of all supporting evidence on behalf of the exceptor, that such taxes were improperly paid.

C. RECOMMENDATION :

1. That the sixth Exception should be sustained insofar as it applies to the failure of the Receivers' accounts to reflect the actual facts in connection with loans and advancements to tenants and that said Receivers be required to complete their accounts in that respect.
2. That prior to any discharge of said Receivers and their bondsmen, an account showing final disposition of the \$2,200.00 check from the Home Insurance Company should be required, together with final disposition of the proceeds therefrom.

EXCEPTION 7. * *

A. FINDINGS OF FACT:

1. That bookkeeping was only one item of the clerical expense for which allowance is sought.
2. That considering the matter as a whole, the allowance claimed for clerical expense is reasonable and proper.
3. That no credits are claimed for clerical expense after the necessity for such service had ceased.

B. CONCLUSION OF LAW :

1. That the fact that the books were not kept by the best known system or even an efficient system, does not justify the denial of any allowance for clerical expense, of which bookkeeping is only one item. Particularly where sufficient facts upon which accounts may be rendered are available.

C. RECOMMENDATION :

1. That the Seventh Exception should be overruled and dismissed.

EXCEPTION 8.

A. FINDINGS OF FACT:

1. That loans and advancements made to tenants by the Receivers are not fully reflected in the accounts filed, to the extent indicated by the books of account kept by the Receivers.
2. That in the absence of such complete accounting, it is impossible to pass upon the exception in its present form.

B. CONCLUSION OF LAW:

1. That in view of the form of the exception and the state of the evidence, the Master is not justified in passing finally upon the same.

C. RECOMMENDATION:

1. That final determination of the question involved in this exception be held in abeyance, pending the filing of the Receivers' completed accounts as recommended under Exception 6, in the Master's memorandum.

EXCEPTION 9.

A. FINDINGS OF FACT:

1. That the evidence does not indicate any connection of Receiver Florence with the Proctor Transaction; or that he had any knowledge thereof; or that he shared his fee with others or shared in the fee of any other person.
2. That there was an agreement between O. C. Ingalls, attorney for the Receivers, and Receiver Simpkins, for the "equalization" of fees received by them in this case.
3. That pursuant to said agreement, a substantial sum was paid by Mr. Ingalls to Mr. Simpkins, from money received by Mr. Ingalls as attorney for the Complainant.

4. That Receiver Simpkins paid Mr. Ingalls nothing whatever from any amounts received by the former herein.
5. That the evidence does not indicate that Mr. Ingalls had any knowledge of the Proctor transaction or any part therein.
6. That Receiver Simpkins, received \$2,797.00 from Mr. Jones for his assistance in the Proctor transaction.
7. That Receiver Simpkins, paid or caused to be paid to Davis Harrison, attorney for the Prudential Insurance Company, the sum of \$1,000.00. That it is not shown that any part of said sum came from the receivership, but it does appear that \$500.00 came from the \$1,000.00 paid to Receiver Simpkins in the Proctor transaction.
8. That it is not shown that Mr. Harrison shared his fee with any other person.
9. That the various amounts mentioned and the transfer thereof between parties, are not shown by the accounts filed.

B. CONCLUSION OF LAW :

1. That under the circumstances disclosed by the record, it is not absolutely essential that said facts should be revealed or set forth in the accounts of the Receivers herein; since that information is before the Court for such consideration as it may require.

C. RECOMMENDATION :

1. That the Ninth Exception should be overruled and dismissed.

EXCEPTION 10.

A. FINDINGS OF FACT:

1. That Receiver Simpkins, did, prior to sale and while acting as Receiver, enter into an agreement with E. F. Jones of Washington C. H.,

Ohio, whereby he agreed to assist Mr. Jones in securing title to the 11 farms belonging to the estate and located in Madison County, Ohio, after such title should be secured by the Prudential Insurance Co.

2. That pursuant to said agreement, Mr. Simpkins was active in negotiating the sale of said farms by the Prudential Insurance Company to the Proctor Interests.
3. That for his services in the matter, Mr. Simpkins received a total of \$2,797.00 from Mr. Jones, \$200.00 of which may have been for other services.
4. That any influence possessed by Mr. Simpkins and sought to be purchased by Mr. Jones, was influence with the Prudential Insurance Company not influence as a Receiver.

B. CONCLUSION OF LAW:

1. That under the orders of this Court, the Receivers Simpkins and Florence, were Receivers of the rents and profits only.
2. That under said orders, it was the duty of said Receivers "so to preserve, control and manage the property in his custody that, if it were sold, the fair value thereof could be realized on the sale."
3. That the position of Receiver Simpkins under the circumstances in the record, was not that of both buyer and seller.
4. That in the circumstances shown by the record, Receiver Simpkins had no control over the sale held by the United States Marshal.
5. That the Receiver Simpkins, was Receiver for the rents and profits only and hence, by the Proctor transaction, derived no profit from the subject matter of the trust.
6. That by the agreement with Mr. Jones, Receiver Simpkins did not occupy a position in which he represented conflicting interests.

7. That the conduct of Receiver Simpkins was objectionable in that it was open to, and did cause criticism which, as an officer of this Court, it was his duty to avoid; but that under the circumstances, such conduct constituted no violation of his trust which would justify action by this Court in the manner requested in this exception.

C. RECOMMENDATION:

1. That the Tenth Exception be overruled and dismissed.

EXCEPTION 11.

A. FINDINGS OF FACT:

B. CONCLUSION OF LAW:

1. That the Receiver Simpkins has been guilty of no breach of conduct or trust herein which would bar him from claiming and being allowed reasonable compensation for his services as such Receiver.

C. RECOMMENDATION:

1. That the Eleventh Exception should be overruled and dismissed.

EXCEPTION 12.

A. FINDINGS OF FACT:

1. That this exception relates to compensation paid by the Receivers to their attorneys under an order of Judge Hough, dated January 17, 1933.

B. CONCLUSIONS OF LAW:

1. That objection to allowance of credits therefor, the payments having been made under a valid court order, cannot be sustained at this time.
2. That the part of said exception reading: "and no compensation should be payable to the Receivers' attorneys because of such misconduct and the violation of their duties and obligations and

because of the matters and things in these exceptions set forth," is not a proper objection to the accounts in question, since no credit is claimed in said accounts for future payments to said attorneys and the sums paid have been paid under court order.

C. RECOMMENDATION:

1. That the Twelfth Exception should be overruled and dismissed.

EXCEPTION 13.

A. FINDINGS OF FACT:

1. That the dual capacities of the various parties were known to Judge Hough, but that he was not informed of the "fee-splitting" arrangement nor of Mr. Simpkin's connection with the Proctor transaction.
2. That the record shows that Judge Hough believed that the Prudential Insurance Company was the only party concerned by the conduct of the Receivers; and Crites Inc., although a defendant, did nothing to change that belief at a time when it could have been helpful to the Court.
3. That the Proctor interests were not prospective buyers at the Marshal's sale because of the fact that they demanded a warranty deed supported by the Prudential Insurance Company and for the whole tract.
4. That there is no substantial evidence to support an inference of controlled bidding or illegal conspiracy with reference thereto.
5. That the assertion made by Mr. Ingalls that bids were stifled, was by him denied under oath and has no weight.

B. CONCLUSIONS OF LAW:

1. That the Receiver Simpkins has been guilty of no misconduct which would justify the relief requested by the Exceptor herein.

2. That the facts of record do not furnish any sufficient legal basis for surcharge against the Receivers, nor do they require denial of compensation to the Receivers.

C. RECOMMENDATION :

1. That the Thirteenth Exception be overruled and dismissed.

THE APPLICATION OF O. C. INGALLS FOR FEES.

A. FINDING OF FACT :

1. That many of the items included in the statement of the services rendered by Mr. Ingalls, in support of his application, could have been rendered only for and in behalf of the Prudential Insurance Company and are not chargeable to this estate.

B. RECOMMENDATION :

1. That said application for fees should be disallowed and the applicant required to file a new application setting forth his services in detail, and making clear distinction between the services performed for the Prudential Insurance Company and those performed for the Receivers herein.

VIII *Submission of the Record:*

I hereby certify that there is submitted herewith, a complete copy of the transcript and record of the proceedings before me in the cause aforementioned and herein considered.

Respectfully submitted,

G. H. BUTT,

*Referee in Bankruptcy—
Special Master.*

TRANSCRIPT OF TESTIMONY.

HEARING

Before HONORABLE MELL G. UNDERWOOD, commencing
June 2nd, 1937.

PRESENT:

MESSRS. RICHARD SIMKINS and GEORGE FLORENCE, Re-
ceivers;

MESSRS. O. C. INGALLS, and DAVIS HARRISON,
*On behalf of the Receivers, and also counsel for
The Prudential Insurance Company of America;*

MESSRS. HAFFENBERG AND ROSENBAUM (MR. NATHAN
HAFFENBERG present) of Chicago; and

MESSRS. ARNOLD, WRIGHT, PURPUS AND HARLOR (MR.
HARLOR present) of Columbus,

On behalf of Crites, Incorporated.

Wednesday Morning Session,

June 2nd, 1937.

The Court: The Prudential Insurance Company of America, plaintiff, vs. H. M. Crites and others, defendants, some twenty-two cases numbered 927 to 948 inclusive, are here for hearing on the final account filed by the receivers herein upon their application for confirmation and upon application of O. C. Ingalls, attorneys for the receivers for compensation and expenses.

The Court is directing that a copy of the record be taken and taxed in the costs if there is no objection.

Mr. Harrison: I wish to file written objections to the application of O. C. Ingalls for additional compensation.

Mr. Haffenberg: If the Court please, this report brings up a situation that I think has been held in abeyance three and one-half years, Mr. Harlor and myself representing creditors of H. M. Crites in an estate involving liabilities of something over a million dollars, the principal assets being farms covered by foreclosure actions.

The foreclosure actions were instituted in February, 1932, the sale confirmed on July 18, 1933. From that time until this we have been waiting for the filing of these reports, and the application for confirmation. If some rumors that have come to our attention in the past few days have a basis then we are obliged to advise the Court that this case appears to be pregnant with fraud and imposition. Since May 25th, the other day, when we were first advised of this application we have lost no time to prepare questions so as to proceed with the investigation and we would like to ask the Court's indulgence to permit us to examine the interested parties at this hearing.

The Court: Can you give me an idea how long it will take?

Mr. Haffenberg: That all depends on what their answers or responses are. I would say that it would take us perhaps all of today, but I think it is pertinent, if I may impose upon the Court to that extent, to permit us to continue this examination right through until we finish.

The Court: This is a matter which involves an accounting?

Mr. Haffenberg: Yes, but in addition to that it involves a question of whether or not fraud has been practiced upon this Court.

The Court: The Court will refer the matter to a master, will make a general reference and order him to report generally upon the specified interests.

Mr. Haffenberg: If your Honor please, does that mean that we will proceed at once?

The Court: If it is possible for you to agree on that matter, you can proceed to a hearing immediately. If this matter involves an accounting it will take some time.

Mr. Haffenberg: The accounting end might be referred to a Master.

The Court: Is there an objection to referring the matter generally?

Mr. Haffenberg: Yes, if your Honor please, at this time I would much prefer, speaking for the interests that we represent, to have the hearing of the receivers in open court.

The Court: That phase of the case then will be heard by the Court at this time. How long will it take to hear that?

Mr. Haffenberg: I imagine Mr. Simpkins will take up not to exceed half an hour, and Mr. Ingalls the same, and Mr. Harrison the same.

The Court: After you have completed that part of the hearing is there an objection as to the reference?

Mr. Haffenberg: Not as to the accounting.

The Court: If agreeable to all parties, the Court will order the matters generally referred to the Referee as Special Master, and I think he will proceed with your hearing this afternoon.

Mr. Haffenberg: I believe in Ohio there is a statute of limitations applying to fraud actions that runs four years. This sale took place July 1st, 1933. The filing of this report comes at a time, that is the application for the approval of these reports, comes at a time when our time is pretty close, if remedies must be pursued. I think that the hearing on the receivers' activities with the funds and assets of this estate might proceed, and then the accounting, so that we can file exceptions to the accounting and proceed later with the accounting. That is a suggestion.

The Court: That is when the matter is referred to the Master?

Mr. Haffenberg: Yes.

The Court: There will be no objection to that?

Mr. Ingalls: None on our part.

The Court: If there is no objection it will be so ordered.

Mr. Haffenberg: Mr. Ingalls.

O. C. INGALLS, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Q. Mr. Ingalls, you are counsel for The Prudential Insurance Company, the plaintiff in these foreclosure cases on the hearing now proceeding before the Court? A. I am one of the counsel.

Q. Who is your associate counsel? A. Davis Harrison.

Q. Are you likewise counsel for the receivers, Mr. Simpkins and Mr. Florence, who were appointed by the Court as receivers for these properties? A. Correct.

Q. Will you state when you were first retained as counsel for The Prudential Insurance Company, the approximate date, please? A. Approximately on or about the 20th or 23rd of February, 1932.

Q. State by whom you were retained? A. By Mr. Harrison and Mr. Simpkins.

Q. Davis Harrison? A. Originally by Mr. Simpkins, and later by Davis Harrison.

Q. Mr. Simpkins being the same party that was appointed receiver here? A. Yes.

Q. In what manner were you retained, how were you engaged? A. Well, Mr. Simpkins stated that there was to be an application for the appointment of a receiver for the Crites farms and their operation, and he wanted me to join with him in the matter, and to see—he was to be appointed the receiver, and I was to be appointed one of counsel for the receivers.

Q. Was that conversation with Mr. Simpkins prior to hearing from any representative or counsel for the Prudential Insurance Company? A. Yes.

Q. How shortly after that did you hear from The Prudential Insurance Company? A. Oh, I do not know. It was approximately the day before the action was brought when Mr. Harrison came into our office with Mr. Simpkins.

Q. Mr. Harrison is your associate counsel in this case? A. Yes.

Q. You say he was in your office with Mr. Simpkins? A. Yes.

Q. Did Mr. Harrison know that Mr. Simpkins had referred you to The Prudential Insurance Company as an assistant? A. I presume so.

Q. He was introduced to you by Mr. Simpkins, was he not? A. Yes.

Q. Mr. Ingalls, you were acquainted with the bankruptcy proceedings, being instituted or having already been instituted against H. M. Crites? A. Yes.

Q. You are also acquainted with the efforts of some of the larger creditors attempting to work out a reorganization of the affairs of H. M. Crites? A. Yes.

Q. As a matter of fact, you also represented other general creditors of H. M. Crites, and you participated in the bankruptcy proceedings, did you not? A. I did.

Q. From time to time you conferred with Mr. Harrison and with Mr. Simpkins as to the progress of the case of H. M. Crites? A. Correct.

Q. You were acquainted with the fact that Mr. Wellman of the Huntington National Bank and the Continental Can Company, the First National Bank of St. Louis, or their representatives, were endeavoring to work out some arrangement for the purpose of salvaging the utmost out of the assets of H. M. Crites? A. Yes.

Q. You met with their representatives from time to time during the pendency of the bankruptcy proceeding, did you not? A. Yes.

Q. You filed a report here for an allowance of fees, referring to the report filed by you in this matter, will you state to the Court what you meant in your application therein by setting forth in that petition that the property was sold to Prudential, no one else having a chance, for \$308,000.00? A. I meant exactly what I said, that the Prudential bid in the property and no one else had an opportunity or the prospective bidders were given to understand that the Prudential was going high enough to buy in the property.

Mr. Harrison: If the Court please, I would like to ask—

Mr. Haffenberg: I have not any objection to counsel cross-examining but may I suggest that the cross examination be reserved.

Mr. Harrison: I wish at this time to move to strike out the answer on the ground that it was a conclusion of the witness as to what somebody was given to understand.

(Motion overruled; exception by Mr. Harrison.)

Q. What did you mean by the following statement appearing; "the tremendous size of these farms and the fact

that the Prudential Insurance Company did insist upon buying all of them, kept away a great many bidders who were interested in buying these farms"? A. Well, I know of one instance in one of the Pickaway County farms that the Prudential paid in excess of the amount of its mortgage to get that farm, and I was told by people who were interested in these various farms, who had gone to see the Prudential Insurance Company that they told me that there was no chance of their being able to buy any of these farms at this auction.

Q. Is it not a fact that there were a number of parties interested in making a bid on these farms from time to time during the pendency of the foreclosure proceeding?

A. I had men coming to my office inquiring about it and asking to be shown the farm.

Q. And as far as you knew you gave them the information with reference to the location and as to who the receivers were? A. Yes.

Q. In every instance you advised the bidders that the property was under foreclosure, did you not? A. I did.

Q. And as to your interest in the matter, and that you represented the receivers, and who the receivers were? A. And that I also represented the Prudential Insurance Company.

Q. Did you refer them to the Prudential Insurance Company? A. I did.

Q. To whom associated with the Prudential Insurance Company did you refer them to? A. I referred them to Mr. Harrison.

Q. Did you have any correspondence with Mr. Harrison with reference to these prospective bidders? A. No.

Q. Any long distance calls? A. No, I think not.

Q. Any conversations with him from time to time as you met with him about these prospective bidders? A. No, I saw very little of Mr. Harrison just prior to the sale.

Q. Before the sale, and during the pendency of the foreclosure proceeding, did you talk to Mr. Harrison about these various prospective purchasers? A. No.

Q. Did you talk to Mr. Zimmerman of the Prudential Insurance Company? A. I don't think I did. I think Mr.

Selby in my office discussed the matter with Mr. Zimmerman at one time.

Q. Are you in position to state whether any representative or agent of The Prudential Insurance Company was acquainted with the fact that you had interviewed bidders or prospective purchasers for any of the farm lands specified in these foreclosure proceedings? A. I could not say. I discussed the matter with Mr. Simkins and I don't think I discussed the matter with any agent of the Prudential.

Q. Did you make any suggestion to them? A. The only thing I did, I told them to be present at the sale.

Q. Did you make any arrangement with Mr. Harrison at the time of this visit to you before the foreclosure proceeding and following these foreclosure proceedings with reference to fees? A. No arrangement made at that particular time. The arrangement—on March 16th we wrote a letter to the Prudential.

Q. What year? A. 1932, we wrote a letter to the Prudential, it was written by Paul Selby, my partner, advising them that a payment on account of services rendered is altogether fitting and proper. We had a letter back from Mr. Harrison on March 28th. We replied to that—who stated that a fee of from fifty to seventy-five dollars per case is usually allowed. On April 4th we go back and told them that in view of the size of the estate and the amount of work that is going to be necessary that that amount of fee is not satisfactory to us. On April 11th Mr. Harrison replies and states then if it is necessary to have an advancement please write him frankly. On April 18th we wrote him back, that it was the usual practice of this office to receive retainer fees on litigated cases, which continued for an indefinite period, and we therefore very respectfully but firmly request advancement of retainer fee as requested.

Q. How much was that? A. That was an advancement of fifty dollars per case, or \$1100.00.

Q. Was that the total amount that you received from The Prudential Insurance Company? A. That is correct.

Q. Did you receive any fees from any other interested party, or any other party interested in the foreclosure

proceedings? A. The only fee was the fee of \$250.00 received as attorney for the receiver.

Q. Allowed by the Court? A. Yes.

Q. Did you share any of your fees received from either Mr. Harrison or the Prudential with any other party interested in this case? A. Yes, I did.

Q. Who? A. Mr. Simkins.

Q. When, and how much? A. \$275.00, if I can find it here.

Q. Were all your fees paid to Mr. Simkins by checks?

A. Yes.

Q. No cash? A. No cash.

Q. You still have those checks? A. I assume we have, yes.

Q. Have they been destroyed just recently? A. I do not think so.

Q. Are you willing to produce them in court when called for? A. Yes.

Q. Was there any correspondence in connection with the fees passed between you and Mr. Simkins? A. I do not think so.

Q. Did he ask you for these fees? A. No.

Q. Was he receiver at the time the fees were paid him?

A. He was.

Q. Did he know why you paid him these fees? A. I think so.

Q. Did you write any letters? A. I do not think any letters were written.

Q. At the time you handed the checks to him did you tell him what they were for? A. I told him it was half of the fees received by me.

Q. Did you tell him from whom you had received those fees? A. Yes, from The Prudential Insurance Company, from Mr. Harrison.

Q. Did you have any understanding with Mr. Simkins as to the participation of fees received either by you or him? A. We had an agreement when we entered into the case that we would divide the fees in this case.

Q. What do you mean by that, "divide the fees in this case"? A. I presumed that he expected to be appointed receiver, and he would receive certain fees there, and I

would receive a fee as attorney for the receiver, and we would pool those fees.

Q. You mean by that, Mr. Ingalls, that any fees received in or arising out of this case would be pooled or divided between you? A. That is what I assumed.

Q. Was it his suggestion that he be appointed receiver or recommended to the Court to be appointed receiver? A. As I recall the conversation, he came up to see me and said that The Prudential Insurance Company was going to have him appointed as receiver in this matter.

Q. Did you know that he had represented The Prudential Insurance Company in other matters prior thereto? A. Yes.

Q. Did he state anything to you about representing them generally in and about Circleville as counsel? A. Yes.

Q. And that representation had gone on for some time prior to your entry into the Crites case? A. Yes.

Q. Did you ever meet either Mr. Zimmerman or Mr. Little? A. I think I have met both of them.

Q. Do you recall when you first met them? A. No, I do not, some time in the spring or summer of '32, early summer.

Q. Was there any other agent or representative of the Prudential Insurance Company that you had met or talked to about these foreclosure cases? A. No, sir.

Q. Other than Mr. Harrison, is that correct? A. That is right.

Q. Do you recall at or about the time that the bankruptcy proceedings were dismissed, do you recall that incident? A. I must have had some indications.

Q. Refreshing your recollection, do you recall Mr. Harrison or a representative of the creditors talking to you with reference to withdrawing objections to the dismissal on behalf of the Standard Oil? A. Yes.

Q. Did Mr. Harrison have any contact with you then in that connection? A. I do not know who it was, but there was some pressure brought to get me—I do not know whether Mr. Harrison, but there was some pressure brought to get me to release my objection on behalf of the Standard Oil Company.

Q. Were you present at the hearings before Judge Hough? A. Yes.

Q. At which time Mr. Harrison, counsel for the bankrupt, Mr. Harlor, and myself, and representative creditors were present discussing the various methods whereby this estate might be worked out? A. Yes.

Q. And at which time the foreclosure proceedings were likewise discussed? A. Yes.

Q. Did you ever meet Mr. Jones of Washington C. H.? A. No.

Q. Colonel Proctor of Cincinnati? A. No.

Q. Or any agent or representative of either of those two gentlemen? A. No.

Q. Did you ever hear of their interest in any of these farm lands? A. Yes, shortly after the sale to The Prudential Insurance Company I learned that Colonel Proctor had bought all of the Madison County lands.

Q. When did you first hear that? (No reply.)

Q. To refresh your recollection, the sale took place on July 1st, 1933. They were bid in by The Prudential Insurance Company on that date on a marshal sale, the sales were confirmed on July 18th, 1933. With reference to those dates, July 1st and July 18th when did you first hear of Colonel Proctor or Mr. Jones' interest in the acquisition of any of these farm lands, before or after the sale conducted by the marshal, or the confirmation? A. It must have been after both of them, before I heard of it.

Q. Had you seen Mr. Simkins from time to time? A. I do not know, I could not be sure that I had.

Q. Did Mr. Simkins report to you that either Jones or Proctor was interested in acquiring these lands prior to the Marshal sale? A. No.

Q. Prior to the confirmation? A. No.

Q. Were you present at the hearing in court at the time of the confirmation of the sales? A. No.

Q. Can you state now when you first learned, and from whom, of the sale of the lands to Colonel Proctor or Mr. Jones? A. It was some time after the sale—I do not know, it was a real estate man from Findlay who wanted to buy these farms and came into our office before, he

came in and told me that Colonel Proctor had bought the Madison County land.

Q. Had you seen Mr. Simkins prior to the marshal sale? A. Oh, yes, you mean prior to the sale, yes I had seen Mr. Simkins.

Q. Had you seen Mr. Florence prior to the marshal sale? A. Yes.

Q. Had you seen them subsequent to the sale and prior to the application? A. Application for confirmation?

Q. Yes. A. I couldn't say whether I seen them in that interval or not, because at that time I was not called upon by The Prudential Insurance Company to approve any of the various applications.

Q. Did you receive any portion of the fees received by Mr. Simpkins in any matters arising out of these cases? A. I did not.

Q. Did you talk to him about paying you? A. I don't think I did.

Q. Did you write to him? A. Yes.

Q. Requesting the payment of fees, and have you that correspondence with you? A. I do not know whether I have or not. I wrote Mr. Simpkins, I know, after I heard there had been an allowance, and that I had not participated in it.

Q. Will you advise the Court what that allowance was, or that you had written to him about? A. \$1800.00 to each of the receivers.

Q. Were there any other fees arising out of these foreclosure matters or anything pertaining to them that you called upon Mr. Simpkins for participation in? A. No.

Q. Did you know of any fees that Mr. Simpkins obtained in representing either Mr. Jones or Colonel Proctor? A. No.

Q. Did you hear of them? A. I heard of it, yes.

Q. When, and from whom? A. In the last couple of years by the Grape Vine Route.

Q. Do you know what that fee was and the amount thereof? A. I do not.

Q. Did you ask Mr. Simpkins about it? A. No.

Q. Did you know at the time of the confirmation that Mr. Simpkins was representing the purchaser? A. I did not.

Q. Did you know of that then? A. No.

Q. Did Mr. Selby know of that then? A. No, I am sure he did not.

Q. Were you present at any meeting at the Neil House in Columbus, Ohio, prior to the marshal sale at which either Mr. Jones or Colonel Proctor or a representative of either of them, and Mr. Simkins and representatives of the Prudential Insurance Company were present? A. I was not.

Q. Were you advised of that meeting? A. I was not.

Q. Were you advised of any negotiations between Mr. Zimmerman, Mr. Little, or any other representative, or agent, of The Prudential Insurance Company, with Mr. Jones or Colonel Proctor regarding the sale or purchase of any of the farm lands involved in the foreclosure? A. I knew nothing about any such meeting.

Q. Did anybody in your office know about it? A. I am sure they did not.

Q. You were in charge of the matter so far as your firm was concerned? A. Yes.

Q. Did you know of any other buyers represented by Mr. Simkins? A. No.

Q. Did Mr. Simkins tell you that he was receiving any compensation from Mr. Jones or Mr. Proctor, or any other purchaser of these lands? A. That was never discussed, never discussed with Mr. Simkins.

Q. Do you know how many farms were involved altogether? Is twenty-two the correct answer? A. Yes.

Q. There are twenty-two separate mortgages? A. That is correct.

Q. And there is no provision in these mortgages whereby the surplus or equity of one applies against the deficit or deficiency in another? A. That is correct.

Q. They are all separate mortgages against separate properties? A. Yes.

Q. Mr. Ingalls, you knew as counsel that it was necessary in the closing up of this estate to file the accounts and reports of the receivers and to apply to the Court for confirmation and approval of the same, did you not?

A. Yes.

Q. You have had some experience along that line?

A. Yes.

Q. Have you made any effort to obtain the filing of these reports, or let me ask you this question, you are familiar with the foreclosure proceedings from the institution thereof up to the present time? A. In the early part of the foreclosure proceedings all of the papers were drawn at my office, and apparently have the backs of my office upon them. The latter part of the foreclosure proceedings they were drawn in Indianapolis, and I saw very few of them.

Q. What do you mean by being drawn in Indianapolis?
A. In Mr. Harrison's office.

A. Associate counsel of yours? A. Yes.

Q. You were counsel here, and knew it was necessary to have these reports filed and approved? A. Correct.

Q. Have you made any effort to get them filed? A. I have been making a determined effort since December, 1933, to find the original reports of the receivers.

Q. So far as you knew, was there anything after the confirmation of the sale that would have prevented the preparation and filing of these reports? A. Absolutely nothing.

Q. Was there anything that prevented the moving of the application for the approval of those reports? A. Not a thing.

Q. You were acquainted with the fact that to do so it was necessary to serve notice upon all necessary parties? A. Yes, sir.

Q. You also knew the creditors were waiting? A. I did not know that.

Q. You knew the property had been conveyed to Crites, Incorporated? A. Yes.

Q. You knew Crites, Incorporated, had some interest in there? A. The only answer I have to that was that I did not know at that time that one of the farms had been sold for more than the amount of the Prudential Insurance Company mortgage; under that assumption, and not knowing that, I felt that the creditors' committee had no interest in this proceeding.

Q. You say you did not know of the farm being sold for more than the mortgage? A. That is right.

Q. Do you know what farm it was that was sold for more than the mortgage? A. One of the Pickaway County farms.

Q. Was that before or after the marshal sale? A. What I mean it was sold at the marshal sale.

Q. Do you know what happened with the proceeds of the difference? A. I do not.

Q. Or any funds arising out of the management income, or sales turned over to them at any time? A. No.

Mr. Haffenberg: That is all for the time being, with Mr. Ingalls. Mr. Harrison?

Mr. Harrison: No questions.

Mr. Haffenberg: All right. Mr. Simkins.

And thereupon a recess was taken until 2:00 P.M. of same day.

Afternoon session, June 2nd, 1937.

Mr. Harrison: Before proceeding, I would like to make a statement with reference to the motion. The Court was no doubt surprised, as was counsel, as to the nature of the inquiry at this morning's hearing. I suggest to the Court that as I understand the issues the only matters which were to be presented to your Honor today were the accounts of the receivers, to which I understand no exceptions have been filed, and I believe, therefore, raising no issues as to those accounts.

The Court: The understanding of the Court was that you made objection to the application of O. C. Ingalls for allowance of fees and expenses asked.

Mr. Harrison: That was the second matter, as I understand it, that was coming on for hearing today. The Court will recall that the line of questioning was directed at a so-called charge of fraud practiced on this Court. Naturally in the absence of any pleading, there was no opportunity for The Prudential Insurance Com-

pany of America, or for these receivers, to be in court on any such issue. If there is a cause of action for fraud against anyone we take it that that would have to be presented in an orderly way. I take it there is no fraud as far as the receivers' reports are concerned, and I do not understand there is any charge of fraud as to the application of Mr. Ingalls for additional compensation. We feel, in view of that fact, that inquiry should not go to any so-called charges of fraud. If fraud existed, there would be a remedy in this tribunal by an action properly brought, apprising the parties of the nature of the fraud charged, if any, and giving the parties an opportunity to appear and defend and present witnesses, and present to this Court any documents bearing upon this question. But at this time The Prudential Insurance Company of America and the receivers separately and severally object to any further proceeding which is not directed to the two matters which are before your Honor for hearing at this time. This matter goes over a period of time. These suits were filed in February, 1932. The sales took place in July, 1933, and the sales were confirmed in July, 1933, and no exceptions were taken, and no attempt made to set aside those sales. The receivers came in and tendered their reports. Your Honorable predecessor, in April or May, 1934,—I do not say they were filed, it is my recollection they were not filed, they were tendered to Judge Hough. Judge Hough said "it seems to me the only party who would be interested here would be The Prudential Insurance Company, inasmuch as there is a deficiency judgment of \$125,000.00," and Judge Hough said "It seems to me the proper way would be for you people to audit these reports and see if they are satisfactory." He said: "I see no occasion to have these filed, and then have exceptions filed", and at that time I took with me a copy of the accounts. There has been some contention—I have told counsel for Crites, Incorporated, and even told the receivers that my personal feelings were that the expenses charged were excessive. I

did not, however, file exceptions. I did not intend to file exceptions.

The Court: Whom are you representing?

Mr. Harrison: I represent the petitioners and also I am an attorney for the receivers by appointment of Judge Hough.

The Court: You represent The Prudential Insurance Company of America?

Mr. Harrison: In the original foreclosure suit.

The Court: At this time?

Mr. Harrison: I am filing objections to the claim for fees, but I am representing their interests in that a record shall not be made here in a proceeding of this nature in which fraud is charged and imputed to the petitioner in the original foreclosure actions. If they are guilty of fraud there is a way to bring them in under a charge of fraud into this court to answer. But I am objecting to a line of procedure which is a fishing expedition which may furnish the basis of some other action, I do not know what, but if so, that other action is the proper forum in which to arrive at that question. I do not think Your Honor under what is an issue here could make any order or finding based upon this testimony, and for that reason I am objecting to it, as to the receivers if the receivers are charged with fraud I think there should be a charge of fraud, and there should be an opportunity to be heard on it.

Mr. Haffenberg: May I answer counsel?

The Court: You may.

Mr. Haffenberg: For the Court's information I want to produce here a letter dated May 25th, 1937, from Mr. Harrison. I quote this paragraph: "I am giving you this information because you had indicated that perhaps Crites, Incorporated, would want to be present at this hearing to be heard in Federal Court, Columbus, Ohio, at ten A.M. Eastern Standard Time, on June 2nd", that is the first knowledge or information we had of the bringing up of this matter, and that indicated that Mr. Harrison him-

self knew that Crites, Incorporated, was interested in these proceedings.

Second, at the outset I advised the Court of our position and it strikes me that it comes rather untimely that Mr. Harrison should wait until some of the information had been elicited before he objects to this proceeding.

Third, Mr. Harrison is in the position of representing the Prudential Insurance Company and the receivers, and he should be the last one in any case to object to any proceeding as to the regularity of either the Prudential Insurance Company or the receivers.

Fourth, and I intimated to the Court that there is fraud practiced upon the Court here, have attempted to produce before him that fraud that relates to the receivers' activities, the receivers' accounts, the receivers' reports of receipts and disbursements, and the counsel's connection with it, as well as The Prudential Insurance Company's connection with it, and I will not stray from that position. We are going into matters here that the Court can upon his motion call upon anybody for his information. I take it it is our duty to furnish it, if possible, and when we are getting it out of the parties connected with this proceeding I cannot understand that objection coming in as it does.

Mr. Simkins: If the Court please, I have had no intimation of any charges of fraud against the receivers. Our accounts were duly filed, and are now refiled, and there is no exception to the filing. Mrs. Lutz, who prepared these accounts, is ill. She has kept these books all during those years, and she was unable to be at my office prior to this hearing. I do not know that I even have the proper books here. As far as the accounting is concerned that I presume will be referred. As to the profits in regard to the sale I would want the privilege of going through the files in order to refresh my recollection as to dates, before I answered any questions. I had no intimation of any such imputation being made here.

Mr. Haffenberg: May I answer that?

In a proceeding brought by Mr. Simpkins the information had then come out that a representative of Colonel Proctor had been in on these properties, and in that proceeding we attempted to obtain the information as to the compensation paid to Mr. Simpkins. Mr. Simpkins objected to giving that information. We have been waiting for this opportunity. I do not see where Mr. Simpkins has any right to object to the question of fees or compensation paid to him in a matter where he is acting as the Court's receiver.

Mr. Simpkins: There is no question but what I was paid by Mr. Jones, but I could not now state the amount, because I have not the data with me to do it. The sale was made by Mr. Jones following the public sale, of these twenty-two farms, and the twenty-two separate partition and foreclosure suits, eleven of them in Madison County, all of which had been handled through Mr. Jones. Mr. Proctor, whose name I did not know in connection with this matter at all until a few days before the sale, and I only knew him through Mr. Jones sending word to me as the representative in our locality of the Prudential Insurance Company that he had a buyer for the farms as a whole if they could be bought as a whole, and he would pay me if I could make a deal with the Prudential Insurance Company. That is the connection. I have not the information available as to the details. I did not know the matter was coming up. I took the matter up with Judge Hough at that time. He said the farms could not be sold as a whole, but they would have to be sold separately.

The Court: The Court on May 13th, 1937, entered an order to the effect that this date would be fixed as a time for a hearing upon the application for confirmation of the final account filed by the receivers, and upon the application of O. C. Ingalls as attorney for the receivers for compensation and expenses, and that all parties interested in the said receivership be notified by the receivers of the date of said meeting.

The Court is of the opinion that the inquiry counsel has been pursuing up to this point is a legitimate inquiry in an honest effort to elicit the facts as to whether or not compensation has been received from other sources as bearing upon the question as to whether or not there should be an allowance of compensation upon this application. Of course, if counsel is taken by surprise and not prepared to give the information which the Court thinks ought to be given to this Court, the Court is perfectly willing to give you that opportunity to produce any proof that you may have to the contrary.

Mr. Harrison: At this time may it be shown both on behalf of the Prudential Insurance Company of America—

The Court: Just a moment. The Court has not finished his statement.

Mr. Harrison: I am sorry.

The Court: Now, it was the understanding of the Court as stated that this date had been fixed for the hearing upon the final account filed by the receivers, and upon their application for confirmation, and upon the application of O. C. Ingalls for allowance of attorney fees and expenses. The time of this hearing was fixed upon the application of the receivers, and their counsel, and the Court thinks that the inquiry is legitimate. If you are asking for a continuance in order to produce any information that you have, the Court might consider that, but the Court is not ruling at this time that the objectors here do not have a right to go into all the various angles of the compensation which the receivers by their counsel received in these cases.

Mr. Harrison: If your Honor please, the Prudential Insurance Company of America and the receivers move for a continuance on the ground of surprise in this, that counsel for Crites, Incorporated, is going into the matter of the sale of these farms, which counsel has not presented by any pleading before this Court, and that in the absence of a continuance it

would be impossible for counsel to present to this Court all of the evidence which would be proper and pertinent under such an inquiry.

The Court: It is the understanding of the Court, Mr. Harrison, that you are representing the Prudential Insurance Company of America?

Mr. Harrison: That is correct.

The Court: And that you have filed objections on behalf of The Prudential Insurance Company of America to the application of O. C. Ingalls for additional compensation?

Mr. Harrison: That is correct, your Honor.

The Court: Those objections were filed today?

Mr. Harrison: Yes, your Honor.

The Court: How long have you known that this hearing had been fixed for June 2nd?

Mr. Harrison: I am not certain, but I should say at least ten days or perhaps two weeks. I apprised Captain Ingalls at once that I would object to his additional compensation.

The Court: Are you in a position to proceed with your objections at this time?

Mr. Harrison: Yes, your Honor.

The Court: On what theory are you proceeding with Crites and Company.

Mr. Haffenberg: We have had no notice of any of the filing of these reports.

The Court: Weren't you given notice of this hearing today?

Mr. Haffenberg: No.

The Court: And the purposes of the hearing?

Mr. Haffenberg: Other than by this letter of May 25th that was forwarded to me. That was the first intimation or knowledge that we have had.

The Court: In view of the statement of counsel of Crites and Company and for The Prudential Insurance Company the Court will continue this matter, and give you an opportunity of presenting any proof that you may desire to present.

Mr. Haffenberg: If your Honor please, receivers' reports, as I understand proceedings in foreclosure,

are always subject to be investigated, the receivers' fees, and expenses.

The Court: The Court is not foreclosing you from making a full and complete investigation.

Mr. Haffenberg: I understood you to say this morning on the matter of accounting that it would be referred to a Master.

The Court: That is right.

Mr. Haffenberg: All we are asking now are these facts relating to the handling of this estate by these receivers, and as I have called the Court's attention this morning here, it is almost four years before these reports have been brought up for confirmation, and any continuance here might be prejudicial to our interests.

The Court: Any what?

Mr. Haffenberg: Any continuance here might be prejudicial to our interests. I say that in view of the facts which I set out this morning.

The Court: The Court is going to give the receiver and his counsel the opportunity of producing any proof that they may desire to produce.

Mr. Haffenberg: They may do that at a subsequent date, if your Honor please, if there is any occasion for proof, but I cannot understand why a receiver cannot say whether or not he received compensation other than filed with this Court.

The Court: You have filed no objection to this report and—

Mr. Haffenberg: No, we have not any basis—

The Court: You have filed no objection to the application of O. C. Ingalls as counsel for the receivers for allowance of compensation. You have come in here today without filing any objection, and desire to be heard upon matters upon which the receiver and counsel have not any information.

Mr. Haffenberg: I do not believe that was the scope of my inquiry. I am not asking them about anything that they have not got. We have taken the precaution to bring an accountant here so as to go into these accounts and prepare us for our objections.

This was not regular in that they should have furnished Crites and Company notice.

The Court: The Court is of the opinion since you have not had notice that you ought to have an opportunity, if you desire, to file objections.

Mr. Haffenberg: I take it that that would follow, if we may develop information upon which to file objection. This is headed, as I recall, the first and final report. They should file their vouchers and receipts. It has been our procedure, and I take it that is the regular procedure that vouchers and receipts accompany these reports. We sat down here with Mr. Harrison this morning and found a discrepancy of twenty-five or thirty thousand dollars. That may be explained, the reports on their face may not fully explain that.

The Court: If you will confine your examination and your questions as to eliciting information along the lines you have mentioned the Court will permit you to proceed.

Mr. Haffenberg: I have intended to do that.

The Court: The Court will limit you strictly to that purpose.

Mr. Haffenberg: Yes, your Honor. We will call Mr. Florence.

And also:

GEORGE FLORENCE, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Q. Name and address? A. George Florence, 43 Jefferson Avenue, Columbus.

Q. You are the receiver appointed by the Court in the twenty-two foreclosure cases of the Prudential Insurance Company against H. M. Crites? A. I was one of them.

Q. You have been receiver from the time of the appointment up to this moment? A. I have never been relieved.

Q. You have been the duly and acting receiver? A. Yes.

Q. This property consisted of a lot of farm land? A. Yes, sir.

Q. You are somewhat familiar with farm operations? A. Yes, sir.

Q. Were you suggested by the Prudential Insurance Company as receiver? A. I never knew who. I was in Cleveland, and was called from there by the Judge.

Q. You filed a bond? A. Yes, sir.

Q. In all of these cases? A. One bond to cover all.

Q. What were your duties as receiver? A. In operating the farms for the first year and that was in 1932 when everything was flat, and the Judge continued for another year. He thought times would be better, and the farms would sell better.

Q. These farms were all operated? A. They were.

Q. Were they operated by tenants? A. By tenants.

Q. Were any of them idle? A. None of them.

Q. So that there was an operation on each and every farm involved in these foreclosure proceedings? A. Yes.

Q. Were any of the farms operated by the Prudential Insurance Company? A. No.

Q. Any of them leased on a cash basis? A. No.

Q. Did you handle all of the cash received as a result of the operation of these farms? A. It was handled by both of us. I think I did most of the depositing of checks. They would come to Circleville and I would deposit them in the City National Bank where all the funds were kept.

Q. Can you state whether all of the funds received in the foreclosure proceedings, or arising out of the operations of these farms, were taken into this receivership account? A. All that I know of.

Q. You mean by that that you turned in all of the funds that you received? A. Every cent.

Q. Did you have knowledge of all receipts made by Mr. Simkins? A. I think so, yes.

Q. Do you know of any instance where they were not turned in? A. No, I do not.

Q. Did you have books of records? A. Yes.

Q. And who kept those books of records? A. They were kept by Mrs. Lutz in Mr. Simkins' office. We used his office as our office.

Q. As the receivers' offices? A. Yes.

Q. Mr. Simkins you referred to was your co-receiver? A. Yes.

Q. Did you keep records of all disbursements? A. Yes.

Q. Were you familiar with all disbursements made in and about these foreclosure proceedings? A. I do not know of anything that was paid in cash except possibly a few dollars during the bank holiday, and I think it would have been less than \$160.00 that came in at that time. I do not recall whether we paid anything at that time or not, and that would be the only time.

Q. What books of records, or what records did you keep of the administration of this receivership? A. We had a separate account for each farm. I think those are the books over there that we had (indicating).

Q. Are they in each of the ledgers? A. Yes, small ledgers.

Q. Did you make entries in those books? A. No, sir.

Q. Did you check over the entries to see whether all the entries of deposits and credits were made in those books? A. I did before the final account was made.

Q. Are you familiar with the final report that was filed by yourself and Mr. Simkins? A. I have not seen it for about four years. I do not know as I am very familiar with it or not.

Q. Mr. Ingalls in his petition stated that the receivers handled I think \$64,000.00 in income, is that correct? A. Somewhere around there.

Q. About how close is it? A. That is pretty close to it.

Q. Have you a record of all the income received out of those farms? A. It is all in those ledgers.

Q. Were all of those receipts deposited in the bank? A. All of them, yes.

Q. Do you know what the disbursements were against those operations? A. No, I do not, I could not say offhand.

Q. Did you issue checks alone? A. No, sir.

Q. Did Mr. Simpkins issue checks alone? A. No, sir.

Q. All checks were signed by both of you? A. Signed by both.

Q. Any currency handled? A. Only during that bank holiday, about \$160.00.

Q. Any loanings or borrowings of the receivers during the foreclosure proceedings? A. Yes. We borrowed to operate with \$7000.00, I believe, from the City National Bank.

Q. That was included in the \$64,000.00 figure? A. I do not know whether it was included in that amount. That was all paid, I know that.

Q. I am showing you a statement that was prepared and handed to us, or rather that was handed to us by Mr. Harrison of the Prudential Insurance Company.

Mr. Harrison: You mean this recapitulation sheet?

Mr. Haffenberg: Yes.

Mr. Harrison: I have it here (handing same to Mr. Haffenberg).

Q. According to the recapitulation sheet will you advise the Court whether or not there was any income received by the receivers other than as shown on this sheet? A. Well, I can tell you the income but I cannot tell you from just going over that, unless I go month by month.

Mr. Haffenberg: I will ask that this paper be marked as Exhibit 1 of this date.

And thereupon the recapitulation sheet was marked as Exhibit No. 1, June 2nd, 1937.

Q. Calling your attention to a total under "income" of \$38,701.00, can you state whether or not there is any other income that is not included on this? A. No, I could not. I never saw that report until today.

Q. Is the report filed by you a complete and full report of all receipts and disbursements of the receivership in these foreclosure proceedings? A. I think it is, yes.

Q. Is it detailed? A. I do not know. I am not sure about that report. It is in the ledger, the whole thing.

Q. Is it itemized? A. Yes, I think you will find the checks the same way, they are itemized on the checks.

Q. Is it necessary to go to the ledgers to obtain the details? A. You can get it from the checks.

Q. Are all of those checks on hand? A. I do not know whether Mr. Simpkins has them here or not, but he has them.

Q. Have they ever been destroyed, to your knowledge? A. Not to my knowledge.

Q. Have you ever been advised of their being destroyed, misplaced, or mislaid, or lost? A. No.

Q. So far as you know, they are all now in the possession of Mr. Simpkins, is that correct? A. Yes.

Q. And have been right along? A. Yes.

Q. Did you have any of them in your possession? A. Not longer than to take them from the bank to Circleville, I believe, when we took them out of the bank.

Q. Was there anything in the administration of this receivership that prevented you from filing your report and account within one year after the confirmation of sale? A. We did file it. We brought it into court.

Q. When? A. I cannot remember the exact date, it was in either April or May, somewhere along there, in 1934.

Q. Calling your attention to the fact that the docket entries do not show the filing of that report until this year, can you explain where that report was? A. As I recall it, when we filed a report, or brought it into the Judge's office, Mr. Harrison was there, and it was turned over to the Prudential Insurance Company for audit.

Q. At the time of your conference with Judge Hough? A. Yes.

Q. You were there then? A. Yes.

Q. Who of the Prudential Insurance Company received that report? A. Mr. Harrison was there at the time.

Q. Have you seen that report from that time to this? A. No, sir.

Q. Have you made any effort to get that report filed? A. There were several letters that were sent back and forth and I wondered why it had not been filed.

Q. Weren't you urging the filing of the report? A. I think you would call it that, yes.

Q. Wasn't it necessary to have that report approved before you could be released from your bonds? A. Yes.

Q. Premiums were running each year? A. Yes.

Q. Did you call that to the attention of the Prudential Insurance Company? A. Yes.

The Court: About what date was this conference held with Judge Hough, if you recall?

The Witness: Either in April or May, I am not sure.

The Court: What year?

The Witness: 1934.

The Court: Your report that you discussed with Judge Hough then was not filed at that time?

The Witness: I do not think it was put on file. It was turned over to Mr. Harrison for audit, to the Prudential Insurance Company for audit.

The Court: Was that upon instructions of Judge Hough?

The Witness: The Court, yes.

Q. Has it been in Mr. Harrison's possession from that time until this so far as you know? A. So far as I know, it has been.

Q. Has it ever been returned to you from that time on to this? A. No.

Q. Has it ever been tendered to you? A. No.

Q. Has any attention of yours ever been called to any correction in that report? A. No.

Q. Has any audit or information been elicited from you with reference to that report? A. No.

Q. Have you been called upon at any time from the date you have mentioned with reference to the conference in Judge Hough's court for any information by the Prudential Insurance Company or any of their agents, or counsel, in connection with their reports? A. No, the only time I talked to Mr. Harrison, and also to Mr. Little of Indianapolis, I asked why the report had not been filed, and we could clean the thing up, and if there was anything wrong with the report. They assured me there was nothing wrong with the report, and it would be coming along very soon, they would get it filed, or finally clean it up and get through with it.

Q. Was this conversation in Indianapolis? A. Yes.

Q. Who was it with? A. Mr. Harrison and Mr. Little.

Q. Who was Mr. Little? A. Mr. Little is district manager, I think, of the Prudential Insurance Company.

Q. You were inquiring why the report was not being filed? A. Yes.

Q. As a matter of fact, you have written letters to them? A. Yes.

Q. Have you copies of those letters? A. I have some replies to those letters.

Q. Will you produce those? A. I cannot right now.

Q. I mean when called upon. A. Yes, I think I can.

Q. Mr. Florence, were all fees received by you as receiver arising in or out of these foreclosure proceedings, or any property involved therein, shown on that report? A. Yes, sir.

Q. Were there any fees received by you from any source or from any party interested in the foreclosure proceedings that are not disclosed in that report? A. No, sir.

Q. Did you receive any such fees from any other person? A. No.

Q. Did you receive any fees in connection with the sale of the foreclosure property or purchase of same from anyone? A. None whatever.

Q. Did you receive any money from any source in connection with the matter arising out of the foreclosure proceedings? A. Not one dime.

Q. Did you know of prospective bidders being interested at any of these times? A. No, sir.

Mr. Harrison: I object to this line of testimony.
The Court: Objection overruled.

Q. Mr. Florence, did you ever meet Mr. Jones or Colonel Proctor? A. I met Mr. Jones once, and I knew Colonel Proctor about twenty-five or thirty years ago, but I had not seen him for years.

Q. Did you meet either Mr. Jones or Colonel Proctor in connection with the acquiring of this foreclosed property before the sale? A. No, sir.

Q. Did you know they were interested in the purchase of this property before the sale? A. No, sir, I did not.

Q. Or before the confirmation of the sale? A. I do not recall whether I heard something about Mr. Jones dur-

ing that time or later, I am not sure about that, I wouldn't say for sure.

Q. If you had known of it, you would have called it to the Court's attention, would you not? A. That was within the eighteen days, you mean?

Q. Yes. A. Oh, yes, certainly. I talked to the Court very often.

Q. If you had known a purchaser was ready and willing to pay more than the amount of the mortgage against that property, you would have so advised the Court, would you not? A. I should think so.

Q. You knew that the affairs of Crites were being worked out by the creditors of the bankruptcy proceedings? A. Yes.

Q. And that they were all trying to get the most out of the assets? A. Yes.

Q. Did you know that Mr. Simpkins was representing Mr. Jones, Mr. Proctor, or any interested person? A. No, sir, I did not.

Q. When did you first learn of any interest in the matter from the standpoint of representing any interested person? A. I never did know to any certainty about it.

Q. Did Mr. Simpkins ever advise you? A. No, sir.

Q. Did he ever advise you what Mr. Jones was willing to pay for that property before the sale? A. No, sir.

Q. Or what Mr. Proctor was willing to pay for the property before the sale? A. No, sir.

Q. You know as receiver it would have been your duty to report to the Court that a bidder was willing to pay more than the bid made for that property? A. I do not know. I talked to the Court about it, and asked the Judge whether or not the land could be sold at private sale or not. He said, no; it would have to go through the Court, and sold by the Marshal.

Q. That was for the purpose of obtaining a fair bid? A. Yes.

Q. He cautioned you in connection with the handling of the sale of that property? A. Yes.

The Court: Was this property sold at public sale?

The Witness: Yes.

Mr. Haffenberg: That was one of the inquiries we pursued this morning for that purpose.

Q. Mr. Florence, you are perfectly willing to disclose all of your records and any information you have in connection with your obligation as receiver here? A. Absolutely, yes. I think you will find all of our records right in the books over there. They were all kept in the office at Circleville.

Mr. Haffenberg: That is all.

Cross Examination by Mr. Ingalls.

Q. Have you any objection to the allowance of fees to O. C. Ingalls, as counsel in this matter? A. I have no objection. I do not know what the fees should be, but I have not any objection.

Q. (By Mr. Haffenberg) You know that Mr. Ingalls closely followed the foreclosure proceedings? A. That he did what?

Q. Closely followed the foreclosure proceedings? A. Yes, sir.

Q. And that he conscientiously represented you as his counsel? A. The first work was done in Mr. Ingalls' office, all of the first work, of the foreclosure, all the papers in the case were made up there, and that was during the first part of it. Now the accounts were not made up there. They were made up down in Mr. Simkins' office.

Q. Didn't you submit these reports and accounts to Mr. Ingalls? A. I don't know whether he saw them or not.

Q. Was Mr. Ingalls' activity with the foreclosure proceedings more or less abated after a while? A. After they had gone along all the accounts and all the records were kept so far as the operations were concerned at Circleville.

Q. You know that Mr. Ingalls was associate counsel with Mr. Harrison? A. Yes.

Q. Was there a time when you started to negotiate more frequently with Mr. Harrison than Mr. Ingalls? A. No, I don't think so. I don't know that there was.

Q. You say in the first part of the proceedings— A. In the early part of the proceedings the papers were all made up at his office. After that time there were not so many papers to go in.

Q. Calling your attention to the time of the sale, do you know whether Mr. Ingalls' activity with these foreclosure proceedings was as active as it was before? A. I think most of that was the transfer and so forth, that work was done by Mr. Harrison and came from the Prudential Insurance Company office out there.

Q. You mean from the time of the sale? A. Yes.

Q. Otherwise, you would have been after Mr. Ingalls for the purpose of getting those reports filed and allowed, would you not? A. Yes.

Q. This sale took place about the first of July. What were the conditions of the crops on the farms at that time? A. Thirty-three—they were threshing at the time, the wheat, and, of course, the corn was possibly so high (indicating). The farms looked very good at that time.

Q. Do you know about what percentage of the crops were available for harvesting then? A. The wheat had all been harvested and they were threshing.

Q. Can you state how you as receiver apportioned the interests that the receivers and the Prudential Insurance Company should have in connection with the growing crops? A. The wheat crop, of course, was off, and we had that. The corn crop was retained by the Court for the receivers.

Q. When you say the wheat crop was off, perhaps I do not understand you. A. It had already been harvested.

Q. And the receivers got the benefit of that, is that correct? A. Yes.

Q. Your explanation with reference to the corn, please. A. The corn crop was growing, and that was retained for the receivers by the Court. He said that we would have to take care of the corn crop.

Q. You would have to harvest it? A. Yes, and market it.

Q. And get the returns? A. Yes.

Q. Does your report and records show the handling of all these crops? A. Yes.

Q. Did you inspect the fields with any representative of the Prudential Insurance Company? A. We did.

Q. You went over them and tried to be as careful as you could in that connection? A. Yes.

Q. Was Mr. Simkins with you at that time? A. Yes.
Q. Who handled the major portion of the farm supervision? A. I do not know. We were both out on it quite a lot.
And also:

RICHARD SIMKINS, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Q. Your name and address? A. Richard Simkins, Circleville.

Q. Were you appointed receiver in these twenty-two foreclosure cases instituted by the Prudential Insurance Company? A. I was.

Q. Were you in court today? A. I was.

Q. Did you hear the statements or testimony of Mr. Ingalls? A. I did.

Q. Was there anything in connection with his statements that you desire to have corrected? A. I do not recall any at this time. I would not want to say there was not.

Q. Were there any statements made by Mr. Ingalls that were incorrect? A. I do not recall them that accurately.

Q. If there had been you would have known it? A. I do not say I would.

Q. I have in mind any statements by Mr. Ingalls concerning you. A. I do not recall any that he made.

Q. You were under bond in each of these cases? A. Under one bond in all cases.

Q. You were co-receiver with Mr. Florence? A. That is right.

Q. When did you first learn of the Prudential Insurance Company contemplating taking any action on the mortgages against Crites? A. I cannot tell you.

Q. Did they contact you, or did you contact them? A. I cannot tell you.

Q. Did you handle any matters for the Prudential Insurance Company in and about Circleville or elsewhere prior to the handling of the Crites matter? A. I have

for a number of years represented them in foreclosure proceedings from time to time.

Q. Any other matters than foreclosure? A. No.

Q. Did you handle their work in any particular territory? A. No.

Q. Did you suggest to the Prudential Insurance Company that they retain Mr. Ingalls' firm? A. My recollection is that I did.

Q. And did you suggest to them, or to Mr. Ingalls, that you be appointed receiver? A. No, I did not. Mr. Harrison suggested it to me.

Q. That you act as receiver? A. That is right, now either Mr. Harrison or some man, from some member of the Prudential office. I wouldn't say it was Mr. Harrison.

Q. Who of the Prudential Insurance office have you contacted with reference to the handling of these foreclosure cases? A. I cannot name all of them. I think from time to time I have seen very many of the officers. I recall Mr. Zimmerman or Mr. Simmerman, Mr. Little, and Mr. Harrison.

Q. Mr. Simkins, do you know the total amount of income received by the receivers from all of these farm operations? A. I had a notation of what I think is correct about that, if I may get it, to refresh my recollection.

Q. Sure. A. In giving you these figures I would like to state that Mrs. Lutz, who kept the books and whom Judge Hough authorized us to employ for that purpose, is not now, and has not for some time been available for conference, and I have had my present secretary take this from the book accounts.

Q. You heard Mr. Florence's statement about these reports having been submitted to Judge Hough in 1934? A. That is right.

Q. Was Mrs. Lutz with you then? A. Yes.

Q. Did she assist in preparing the reports? A. She did.

Q. Are these reports any different than they were at the time they were handed to Judge Hough? A. No, what I said was this, that since the loss of the original accounts I have had my present secretary total the gross receipts, and the gross disbursements from the copies that I was compelled to make of the original accounts which I filed here.

Q. What do you mean by the loss of the original accounts? A. I mean that Colonel Florence and I came to Judge Hough's office with twenty-two separate accounts which we had prepared in these cases with copies. We told him that those were our accounts, as receivers, and we desired to file them. He said that he would call Davis Harrison and set a date for a meeting in regard to them. I saw Mr. Selby—well, a few days after that Colonel Florence told me the time set for the meeting, and I saw Mr. Selby in the court house one day. He was a partner of Mr. Ingalls, and he told me the date of the hearing, and on that date I appeared there with Colonel Florence, and Judge Hough said he had no time to go over the accounts, and he wanted to know if Harrison had. Harrison said no, that he would like to take the copies and send to the Prudential Insurance Company office, as I understood it, for audit.

Q. Mr. Harrison stated that to Judge Hough? A. That is right. Judge Hough at that time said that he would like to fix the receivers' compensation. Those two gentlemen made some figures together, Mr. Harrison and Judge Hough, and they fixed the compensation between themselves, and stated it to us. Judge Hough said that nobody else had any interest, as he understood it, in these accounts, in view of the fact that there was a deficiency judgment against H. M. Crites for over \$100,000.00, and if there was no objection by the Prudential Insurance Company to the account, he would then file them, and he took the entire set of receipts which we had, which were in a large envelope. We had taken receipts for all the checks that we had written, somewhat over a thousand of them, and had them all together, and numbered, and put them all over in a stack, at the end of his desk, and said: "When I hear from you I will file these accounts." We thought in a short time we ought to hear from him. That was the last I heard from him until some time afterwards.

Q. You referred to these lost reports or accounts, you have reference to the twenty-two receivers' reports? A. Yes, that Judge Hough had put on his desk.

Q. Are any other of the original receipts and vouchers lost? A. They are all lost.

Q. They are all lost? A. They are all lost.

Q. When were they lost? A. They were with the accounts. I have the checks and notations on the stub and check, I think, in practically each case, for what they were given for, but I have not the receipts. I do not think there is any question but what they were all left there.

Q. Is there a question in your mind about their being left there? A. Now, I have no distinct recollection about it.

Q. Will you state now whether you turned over the original receipts to Judge Hough? A. I will say I did.

Q. What brings that to your mind? A. They were all put together.

Q. What were the receipts? A. Our disbursements.

Q. What were those disbursements? A. I cannot give you the amounts. They ran in the neighborhood of fifty odd thousand dollars, I think.

Q. What did those disbursements cover? A. Taxes that we had paid, money that the Prudential Insurance Company had advanced us to pay taxes, and they covered seeds that we bought, and fences that we bought, repairs we made on the houses and repairs on the barns, and they covered expenses which had been ordered by the Court.

Q. Petty cash outlays? A. We had no petty cash outlays.

Q. All your disbursements were by check? A. Every disbursement, with the exception of a short time during the bank holiday, and I wouldn't imagine we disbursed over \$100.00.

Q. You knew it was essential for the receivers to preserve their receipts? A. Yes.

Q. Describe the bundle you claim to have left with Judge Hough? A. A yellow envelope full of receipts.

Q. How large? A. About the size of that one on my desk.

Q. Eight by thirteen? A. I do not know the measurements.

Q. Can you state how many receipts? A. I think something more than the number of checks we had written because oftentimes in writing the checks one farm would overlap another farm.

Q. Is this the envelope you referred to? A. That is. That is my property, and I do not want those lost. They are the checks.

Q. There were receipts for each check you issued? A. Yes.

Q. Was there more than one envelope? A. I don't think so.

Q. Was the envelope capable of being closed? A. I think it was.

Mr. Haffenberg: I will ask that this be marked for identification and impounded with the Court.

The Witness: Just the envelope.

(And thereupon the envelope was marked Exhibit No. 2, June 2nd, 1937, the envelope being 12 by 15½ with the Carrollton clasp.)

Q. The size of this Exhibit No. 2, in which all of the receipts covering disbursements by you and Mr. Florence were deposited? A. Yes.

Q. And which you claim was left with Judge Hough? A. Yes, that is right.

Q. With the original checks? A. No, not the checks.

Q. With the cancelled checks? A. No, I have the cancelled checks. The cancelled checks are in that envelope.

Q. And there was a receipt for each check issued? A. There was more than a receipt for each check issued, because in the disbursement of some of this money oftentimes in general expenses they would overlap, one farm with another. In that case Judge Hough told us the only fair way to distribute the money was according to the appraisal of the farm, which we did.

Q. Did you reimburse either yourself or Mr. Florence for any cash outlays for these checks? A. No.

Q. Did you take receipts from Mr. Florence or yourself? A. Going to your former question, we did not advance any cash; but the first three months we incurred expenses, and Judge Hough told us after the first two or three months, he went over our expense accounts, and he told us to take \$100.00 a month as expenses, each one of us, which we did.

Q. Was there any order entered? A. I do not know.

Q. Did you apply to the Court for any order? A. I do not know. Mr. Ingalls represented us in that matter.

Q. And, Mr. Simkins, coming down to this statement now, can you state the total amount of income received by you and Mr. Florence as receivers? A. This is not the total amount of income. I have not that. I have not had anybody to go over the books for that purpose, the total amount of charges, which includes both the income and the money borrowed, and the money advanced by the Prudential Insurance Company to pay taxes, amounts to sixty-four thousand and some odd dollars.

Q. You mean that those are the disbursements? A. No, sir, that is the total charges.

Q. What do you mean by total charges? A. That is the amounts we received.

Q. In other words, the income here from loans, advancements or farm operations aggregated sixty-four thousand dollars? A. Yes.

Q. You have it itemized on a sheet? A. No, sir.

Q. When did you prepare that sheet? A. I do not know.

Q. When did you see it first? A. I do not recall, I think it was probably prepared at the time the first account was filed, because it has not been prepared since, that I know of.

Q. Is there anything that has come to your attention since that receipt was prepared that would cause any change or modification thereon? A. No.

Q. Does that receipt represent all of the charges? A. I do not make that statement. I say I had a secretary check this, and write down the total charges.

Mr. Haffenberg: We will ask that this be marked as the next exhibit.

(And thereupon the paper above referred to was marked Exhibit No. 3, June 2nd, 1937.)

Q. Have you any statement showing your credits? A. That is on there, several items on there, if you want to look it up.

Q. Reading from this statement it reads as follows: "Total mortgaged indebtedness, \$405,873.19; total amount

of taxes paid, \$16,533.44; total sale of farms, \$308,300.00; total credits, \$59,483.01; total charges, \$64,761.31; buildings repaired"—was that statement prepared for the Prudential Insurance Company? A. No, that was prepared for me.

Q. What does the amount of taxes paid represent? A. I understood that was the amount of taxes that we as receivers had paid on these farm lands.

Q. Can you state whether that represents the amount of taxes paid? A. I cannot state as to the accuracy of that statement. I can state that the secretary was supposed to get the figure from the accounts.

Q. Were all the records pertaining to the receivership kept in your office? A. As far as the books of the receivership and the bank books, and the receipts, and cancelled checks, they were.

Q. Were there any records that were not kept there? A. I imagine there were some records of the receivership that were kept in Mr. Ingalls' office.

Q. With reference to receipts and disbursements? A. No, I would think copies of orders and such things as that I probably did not bother about.

Q. Will you produce all of the ledgers, book accounts, and records pertaining to the receivership? A. I will. I will ask the indulgence of the Court to get Mrs. Lutz, to see that I get the proper ones.

Q. Is there any reason why you cannot produce them? A. None that I know of.

Q. Did the reports prepared by you show all fees received by you? A. They did from the receivership.

Q. Did they show all fees received by you from Mr. Ingalls? A. They did not. They were no part of the receivership.

Q. Did you receive fees from him, as he testified this morning? A. Yes.

Q. Did you receive any fees from any other party interested in or about the foreclosure proceedings? A. I did not.

Q. Calling attention to Mr. Jones, did you receive any fees from him? A. I did not—I did, yes.

Q. When? A. I very carefully explained a little bit ago. I cannot tell the exact time, I know what I was paid for, and the approximate amount.

Q. Where was this payment made to you? A. In my office.

Q. By whom? A. Mr. Jones.

Q. Was it by check? A. I should think so.

Q. Any part of it in currency? A. Not that I recall.

Q. Any part of it in any other consideration? A. Not that I know of.

Q. Was there anybody there besides Jones and yourself? A. I do not think so, unless it was his brother.

Q. Wasn't that a sizeable amount? A. Yes.

Q. Can you state now how much it was? A. I would think—I can't tell you exactly, it was something between two and three thousand dollars.

Q. Two and three thousand dollars? A. It may have been more than that. I told you I would give you the amount, but I haven't it now.

Q. Your records would indicate that? A. Yes.

Q. You will bring in your records with reference to the receipts from Mr. Jones? A. If the Court finds that is any part of the receivership, I most certainly will.

Q. Mr. Jones was interested in the purchasing of the property? A. Not through me.

Q. Answer the question. Mr. Jones was interested in purchasing part of this property that was involved in the foreclosure proceedings? A. From the Prudential Insurance Company, yes.

Q. You were receiver at the time? A. Yes, sir.

Q. Was the amount of fees that you received either gross or net in excess of \$5000.00? A. No.

Q. Did you share the fees you received from Mr. Jones with anyone else? A. Certainly not.

Q. You kept it all yourself? A. Certainly.

Q. Did you receive anything like \$10,000.00? A. No.

Q. Where was that fee deposited or used? A. The fee that Jones paid me?

Q. Yes. A. In my bank account.

Q. And if there were any disbursements out of that fee your records would show that? A. That is right.

Q. If deposited in your bank your records would show that? A. Yes.

Q. What bank, sir? A. First National Bank in Circleville.

Q. Mr. Simkins, did you do any business for Mr. Jones or Colonel Proctor before the connection with the Crites case? A. No, sir, never did any business with Colonel Proctor at any time.

Q. Will you state when you first met Mr. Jones? A. Some time prior to the twenty-two sales in foreclosure.

Q. Where? A. I cannot tell whether I met him in my office or in Columbus.

Q. What was the occasion for Mr. Jones meeting you? A. He wanted to know from me if there was any possibility of buying the Madison County eleven farms as a single tract from us as receivers. I told him as receivers we had nothing to do with the sales. We were merely receivers for rents and profits, and he said he had a party who was interested in purchasing the whole tract.

Q. He stated that very definitely to you? A. That is right.

Q. Was that his first contact with you? A. Yes.

Q. When did you see or hear from him next? A. I do not know, some time right following that, before the sale some time.

Q. Did he say anything else to you? A. No.

Q. He knew then that you were receiver of the properties? A. Yes.

Q. Did he ask you how much the indebtedness was against the farms? A. I do not recall whether he did or not.

Q. Did he ask you what the condition of the farms was? A. No, he told me he had been over them and seen them.

Q. Did he ask you about the title questions that might be involved? A. No.

Q. Did he ask you anything about the foreclosure proceedings? A. I think they had been dismissed.

Q. Did he ask you anything about the situation? A. I do not recall that he did, no.

Q. He just came in and told you he was interested in buying this tract as a unit? A. That is right. He may have discussed those things. I do not recall.

Q. Did he discuss the price he was willing to pay for the property? A. He did not.

Q. Do you recall when that conversation was with reference to the date of the sale? A. Some time before the sale.

Q. How long before? A. I would judge a couple of weeks, I am not certain about that.

Q. Did he tell you whether he was buying it for himself or another fellow? A. He said another party was interested.

Q. Did you know who the other party was? A. He did not say.

Q. Did he at any time ever tell you before the sale who the other party was? A. I cannot say as to that, but I am inclined to think he did some time before the sale. He was very secretive about it to start with, and told me merely it was some Cincinnati parties, and I carried that information on to John Harlor in his office, and I carried it on to Judge Hough that there might be some parties interested in this as a whole. They gave me the only possible answer, that the Court could not sell it as a whole.

Q. Will you state when you communicated that information to Mr. Harlor? A. Some time between my conference with Jones and the sale.

Q. Which conference? A. I think following my first conference with him.

Q. Did you pass that information on to Mr. Harrison? A. Yes.

Q. And to the Prudential Insurance Company? A. Yes, passed it on to everybody I could think of.

Q. Mention those connected with the Prudential Insurance Company that you passed it on to? A. I think I passed it on to Zimmerman. I don't think I saw Harrison, but I passed it on to Judge Hough, and I passed it on to Mr. Harlor. Of course, I did not know what they would give for it.

Q. You did not know what they would give for it? A. Not at that time.

Q. Did Mr. Jones ask to retain you then to represent him? A. He did.

Q. At that time? A. Yes.

Q. In what capacity? A. He told me that his party would only be interested if they could buy this land as a whole, and he asked me if the Prudential Insurance Company bought these farms in if I would assist him in closing the deal with the Prudential Insurance Company. I saw no reason why I should not, that I certainly thought that was not a part of the receivership to sell these farms, and I am not sure whether he made his contract with me, I could have given this information had I known this inquiry would be made.

Q. Did you have a written contract? A. I do not think I had a written contract with him, I am not sure. I may have.

Q. Will you produce that? A. I will if I can.

Q. Can you state the terms of that contract, or arrangement between you and Mr. Jones? A. No.

Q. Anything said about the price that Jones or Colonel Proctor was willing to pay for those farms? A. Not to me.

Q. Did they ever advise you? A. Some time after the sale, some considerable time after the sale.

Q. Now, Mr. Simkins, calling your attention to June 27th, 1933, do you recall the conference at which you were present with Mr. Jones and Mr. Zimmerman at the Neil House in Columbus? A. Yes, I recall that.

Q. Who all were present at that conference? A. Well, I do not think that I was present at any conference that Zimmerman had with Mr. Jones.

Q. Or any other representative of the Prudential Insurance Company. A. No, I do not think that they had any conference at all with Jones in my presence, that is any from recollection. But Jones wanted me to see if they would make any agreement prior to the sale.

Mr. Haffenberg: At this juncture may I ask Mr. Harrison whether a copy of a contract designated Exhibit A, dated June 27th, 1933, is the copy of the original either in his possession or in possession of the Prudential Insurance Company?

Mr. Harrison: I think I have nothing of that sort, Mr. Haffenberg. If I have I will produce it.

Mr. Haffenberg: My question is whether this is a copy of the original that was either in your possession or the possession of the Prudential.

Mr. Harrison: I cannot tell you.

Q. Can you state where this copy was copied from? A. I cannot do that.

Q. Showing you an affidavit that has been filed in this cause by Mr. Harrison, and having as an exhibit thereto a copy of a contract dated June 27th, 1933, which is marked Exhibit A, and purports to be an offer to the Prudential Insurance Company of America, dated June 27th, 1933, and signed Edwin F. Jones, bearing the witness of Richard Simkins and Marion Lutz, do you recall having witnessed such a contract on or about that date? Not the affidavit portion, it is the exhibit I am calling your attention to. A. I do not have any recollection of this.

Q. You have read Exhibit A there, have you not? A. I read part of it. I will read it. (After reading same.) I have no recollection of this. So far as I know it may have been made.

Q. Isn't that exhibit there an offer from Mr. Jones to the Prudential Insurance Company for all the Madison County property? A. It seems to be.

Q. Isn't that offer in the sum of \$249,106.00 for 4844.14 acres of land? A. It speaks for itself.

Q. Does that bring to your mind those negotiations? A. It does not bring to my mind the fact other than Edwin Jones was making an offer for these lands, if he could buy them as a whole.

Q. Did you see Mr. Jones in the preparation of this offer? A. I do not recall.

Q. Did you see the insurance company in the preparation of this offer? A. I do not recall.

Q. Do you recall having received any check or assisting Mr. Jones in the depositing of any check with the Prudential Insurance Company? A. No.

Q. Can you state whether this offer was in your possession on or about the 27th of June, 1933? A. No, I cannot.

Q. Can you state who else was present at the time that offer was drafted or prepared? A. I do not recall it being drafted.

Q. Can you state whether it was handed to you before you signed it? A. I do not remember a thing about it.

Q. Can you state whether you assisted in the drafting of it? A. I have forgotten that completely. I may be able to refresh my recollection by some of these things at my office, but I cannot tell you a thing about that.

Q. Will you produce at the next hearing in this cause all of the documents, papers, correspondence, and telegrams received by you from Mr. Jones or the Prudential Insurance Company with reference to the sale of 4844.14 acres in Madison County land? A. I certainly will.

Q. To your knowledge have you destroyed any of those papers? A. Not to my knowledge.

Q. Did you receive any correspondence from Mr. Jones? A. Not to my knowledge.

Q. Were all your conversations in person with him? A. Either that or over the telephone.

Q. Did you talk to anybody in Cincinnati representing Mr. Jones? A. No.

Q. Do you have any recollection of talking to anybody in connection with a law office in Cincinnati representing Mr. Jones? A. Yes, but I think that was some time before the deed was delivered to Charley Sawyer.

Q. Was that the firm of Pogue, Hoffheimer and Pogue? A. I don't remember of talking to them.

Q. Who is Mr. Sawyer? A. He is a member of the firm of Dinsmore, Shohl and Sawyer.

Q. Where? A. At Cincinnati.

Q. Whom did they represent? A. I know now they did represent the Proctor interests. I did not know it at that time. At least I suppose they did.

Q. You were an attorney at the time? A. Yes.

Q. Did you examine the title for Mr. Jones? A. I did not.

Q. Can you tell what services you performed for Mr. Jones? A. Yes.

Q. What services? A. I talked to Mr. Sawyer in regard to the sale of this land following the sale to the

Prudential Insurance Company, and assisted him in making his purchase for his man, and he was in debt several places, and they attached his money, and different creditors of his tried to reach his money, and I telephoned around for him.

Q. Creditors of Sawyer's? A. No, of Jones.

Q. But did Mr. Jones tell you whom he was representing? A. Not until some time later in the transaction. He was reticent about it at first.

Q. Was it before or after the sale? A. I cannot tell you.

Q. Before or after the confirmation of the sale? A. I think I knew it probably before the confirmation.

Q. Do you recall Mr. Jones testifying that he met with you and others at the Neil House on or about June 27th, and other representatives of the Prudential Insurance Company? A. There was a meeting there, but my recollection is that Jones and the Prudential Insurance people did not meet, but I may be wrong about that.

Q. Did you advise Mr. Florence that you were representing Mr. Jones? A. I told him I had a buyer for the land, if it could ever be sold as a whole.

Q. Did you disclose the name? A. I did not know the name.

Q. Did you tell him about the talks you had with Mr. Jones? A. I think I did.

Q. When? A. I do not know.

Q. Before the sale? A. I do not know.

Q. Before the confirmation of the sale? A. I do not know.

Q. Did you tell him what Jones was willing to pay for the property? A. I did not know.

Q. Did you tell him what Mr. Proctor was willing to pay for the property? A. I did not know that Mr. Proctor was interested in it.

Q. You were present at a hearing in Circleville in which Mr. Jones testified? A. Yes.

Q. You produced him as a witness for Mr. Crites? A. I think so.

Q. Do you recall the testimony then? A. What?

Q. Do you recall the testimony then of Mr. Jones?
A. I do not.

Q. Do you recall Mr. Jones testified he had talked to Mr. Zimmerman from time to time before the foreclosure proceedings? A. I do not recall.

Q. Do you recall him testifying that he met them at the Neil Hotel in Columbus and tendered them a check for it, meaning the property in Madison County, before the sheriff sale? A. I do not recall his testifying as to that, and I am practically certain he did not do it.

Q. Do you recall him testifying that they accepted a check from him at the Neil House? A. I do not recall that, no.

Q. Do you recall him testifying that you and his brother were there representing him in the matter? A. No.

Q. Do you recall him testifying all under \$286,000 was his for the making of the deal? A. I do not recall that.

Q. Do you recall that he testified that he did not advise you in the first instance, but later on advised you of Mr. Proctor being the purchaser of the property? A. That is just what I told you.

Q. And the amount that Mr. Proctor would pay? A. I did not know how much Mr. Proctor would pay at any time.

Q. Do you recall him so testifying? A. No, I do not.

Q. Did Mr. Sawyer represent Mr. Jones in the legal phase of the purchase? A. I don't know, I think he did in some respects. I found out later that Proctor had a very kindly feeling toward Jones, and Sawyer held up his money some way or other until he could get it, but I did not know at the time that he had any connection with it until he took the deed.

Q. Mr. Simkins, did you pay over any portion of the fee you received from Mr. Jones to Mr. Harrison? A. I most certainly did not.

Q. Did you pay it over to any party connected with the Prudential Insurance Company? A. I most certainly did not.

Q. Did you have a monthly reconciliation of your receipts and disbursements with Mr. Florence? A. On the receivers' account, I do not think so. We got our book balanced every once in a while. We never had a great deal of money in the bank at any particular time. We

raised thousands and thousands bushels of corn, but it sold for 14¢ a bushel that year.

Q. Don't you recall that meeting at the Neil House?

A. I recall this about it. I was called there I think possibly by Jones, and I remember distinctly being in the room with Jones, and his brother, and I remember seeing Zimmerman at some other place, some room in that building, but my recollection is that they were not together.

Q. Was there anybody else other than Zimmerman?

A. Some other member of the company, I do not know who it was. It was not any of the principals of the company.

Q. Mr. Worthington? A. I was trying to think of that fellow's name.

Q. What was said or done at that meeting that you have reference to at which you were called to the Neil House? A. My recollection is that Mr. Zimmerman in my presence called Mr. Little, turned around there and said to the other people who were in the room, I don't think that Jones was there, that they could not sell or contract to sell any of these properties until after the foreclosure sale. That was always the attitude they took when he talked to me.

Q. Were you in that room when he talked to Mr. Little?

A. I remember that he called him. I don't remember whether I stayed in when he talked to him or not.

Q. Were you in another room with Mr. Jones? A. I remember of being in Mr. Jones' room, and in Zimmerman's room, whether they got together or not I do not recall.

Q. What was the occasion? A. Mr. Jones had called me, I think, to meet in Columbus.

Q. For what purpose? A. For buying this farm.

Q. He had the Prudential Insurance man there? A. I think the Prudential Insurance man was there.

Q. The Prudential Insurance man knew you were the receiver of the property? A. Yes, sir.

Q. You from time to time had frequent talks with him? A. Yes.

Q. He knew you were co-receiver with Mr. Florence? A. Yes.

Q. And discussed the operation of the farms? A. Yes.

Q. And discussed with you your compensation as receiver? A. I do not think so, not with Zimmerman, never.

Q. He also knew that Mr. Florence was receiver? A. That is right.

Q. Was Mr. Zimmerman a field man? A. I think he was.

Q. It was his duty to go out and get buyers for property? A. No, my recollection of it was that he assisted in the management of the farms that they owned and he went around the country, like Mr. Hysell, who were sub-agents.

Q. Was there any discussion about the price to be paid for the Madison County farms? A. Not to my recollection.

Q. Any deposit handed over? A. None handed over.

Q. No check to Mr. Jones? A. Not in my presence.

Q. What was the occasion for Mrs. Lutz being there with you? A. She was not there at the Neil House.

Q. Was this contract brought back to you at Circleville? A. I don't remember a thing about that contract. That contract was not in the Neil House that night, no contract there signed by anybody.

Q. With reference to this contract then, or exhibit, can you state when your attention was first called to it? A. Just now?

Q. The first time. A. This is the first time I have any recollection of it. I may be able to find something in my files that will call it to my recollection.

Q. Do you recall the figure of \$249,000.00? A. I do not. As a matter of fact, I do not think that is the figure at all that the farm was sold for, although I do not know about that. My recollection is that the farm was sold for an entirely different figure.

Q. Was there any deal that somebody was to get the difference between that offer and the price paid to the Prudential Insurance Company? A. I do not know a thing about that, other than what Jones told me a long time after.

Q. Jones was telling you about the side deal he had with Proctor? A. No. So far as I knew he was just having a commission.

Q. When Mr. Jones testified in Circleville that he advised you who the principal was, and the man who was to pay for it, and the amount he was to receive by way of difference, you did not advise the Court that he was mistaken? A. No, it had nothing to do with that particular litigation. The Court I think struck all that testimony out, didn't he?

Q. No. A. He should have.

Q. Do you recall at that time the question being asked Mr. Jones as to the fee he paid you, and you having objected to it then? A. I think I objected to it, yes. I think I stated to you also that I had no objection to telling you, didn't I?

Q. Telling me what? A. The amount that I received.

Q. No, you never did. A. I said I had no objection to telling you.

Q. While you are on that subject, Mr. Simkins, do you recall the story being told that Mr. Proctor, or the agent who bought this Madison County property was met at a picnic on July 3rd or 4th following the sale of these properties by the Marshall? A. I never heard that story.

Q. Did you ever discuss that story with Mr. Zimmerman or Mr. Harrison? A. No, I never heard that story before.

Q. Did you ever tell Mr. Harrison that this prospective purchaser was met after the Marshall's sale at a picnic July 3rd or 4th? A. That is the first time I had any intimation of the picnic.

Q. Did you ever tell any representative of the Prudential Insurance Company that that was the first—

Mr. Harrison: I am going to object to this line of testimony. It has nothing whatever to do with the question of payment to these receivers, it is evident. There is the exhibit. The exhibit speaks for itself. The exhibit was filed in this cause. It was a part of an affidavit in support of a motion to confirm the sale. It shows that your purchaser was apprised of this offer and knew all about it. This contract is made an exhibit to that affidavit.

The Court: Is the entire contract incorporated in the affidavit?

Mr. Harrison: Yes, and it is filed in this cause. It was filed in support of a motion to confirm these sales.

Mr. Haffenberg: That cannot be true, the file marks bear date of July 27nd, 1933, the confirmation is July 18th.

Mr. Harrison: I did not say anything about dates, I said it was filed in support of a motion to confirm this sale.

Mr. Haffenberg: The confirmation was on July 18th, and it was because of some rumors which came up since that time—

Mr. Harrison: I am objecting to any further testimony in the absence of some pleading setting up some fraud in this cause. I think your Honor limited the examination to the question of compensation.

The Court: The Court will adhere to the former ruling.

Mr. Haffenberg: A mortgagee in a foreclosure sale who has a debt against the mortgagor say for \$200,000.00, and has an offer for that property prior to a foreclosure sale in an amount in excess of that is obliged to disclose it, because the mortgagor up to the time of sale has a right of redemption.

Mr. Harrison: The testimony of Mr. Simkins is, testifying as Mr. Haffenberg's witness, that he told Judge Hough about a prospective purchaser who would buy all these farms, is that correct?

The Witness: The eleven Madison County farms.

Mr. Haffenberg: I had the pleasure of meeting Judge Hough and he knew our struggles, and I do not think that Judge Hough knew of the facts concerning this. And I will take oath on this statement, that even Mr. Harrison advised us when we were trying to inquire about that farm that the purchaser was obtained after the Marshall sale, and this all developed at a picnic. In other words, we were put to sleep on the reliance of his statement, and it was not until some two years after that we developed any of the facts in connection with this matter.

Mr. Harrison: The Prudential Insurance Company is ready to come into this court and answer some charge

when some definite charge is made, but we have been objecting to a fishing expedition and to matters which we could not be expected to be prepared to meet in advance, to anticipate. When the proper time arrives we expect to be here with any testimony that is necessary, but until that time the burden is upon him with the charge of fraud.

The Court: The Court will give you opportunity to meet it.

Mr. Haffenberg: Mr. Harrison filed this. We were not served with any notice?

The Court: In view of the fact that these objections were filed this morning, and the Court only knew of their existence after court had convened, the Court is going to continue this matter at this time.

Mr. Haffenberg: May I have the indulgence of the Court in showing what effort was made in getting these reports filed?

The Court: If you will limit your inquiry to that and to what was indicated after the noon recess. Otherwise, the Court will adjourn the hearing at this time to a later date. You may proceed.

Q. Mr. Simkins, have you made any effort to get these reports filed and allowed? A. I have.

Q. In what manner? A. I left them with Judge Hough, and subsequently inquired of Mr. Harrison on numerous occasions, and he said they were in the hands of the auditing department in Newark, New Jersey. I talked to Mr. Ingalls last summer about them and told him I supposed I would have to make up new copies, and I did. I think I saw Judge Underwood and told him that these copies had been lost or the originals had been lost, and I would have to prepare new copies from the only copies that I had in my office.

Q. Have you made any effort to get the Prudential Insurance Company to file the copies taken from Judge Hough's Court? A. They claimed they were copies and they were their copies.

Q. Did they tell you any specific reason why the reports were being held back by them? A. Only they were in the Newark office.

Q. For how long a time have you been endeavoring to get the Prudential Company to file these reports? A. I do not say I was trying to get the Prudential to file them, I was trying to get them approved.

Q. To pass on them? A. Yes. I did not know, as a matter of fact, that the originals had been lost until in point of time quite recently. I would say about that six or eight months or a year ago.

Q. Were you present at the Marshall's sale? A. I think I was. I know I was. I know I was in Madison County. I do not know that I was at each sale in Madison.

Q. Did you assist the Prudential Insurance Company in the bidding in of the farms? A. I did not. I had nothing to do with the sale of the farms. I was receiver for the rents and profits.

Q. Were you advising Judge Hough that you were paid any fee by Mr. Jones in the purchase of any of the property? A. I did not.

Q. Did you advise Mr. Harrison that you were being paid any fees? A. I think I did probably. It was no secret.

Q. Did you let all the Prudential Insurance men know that? A. I had no hesitancy in telling them.

Q. Who of the Prudential Insurance people did you so inform? A. I have no recollection of informing anybody.

Q. Did you inform Mr. Zimmerman? A. I do not know who I told.

Q. Did you tell Mr. Little? A. I do not know. I may have told Judge Hough. I would not have hesitated in telling him.

Q. Did you advise Mr. Harrison by correspondence that you were representing Mr. Jones? A. I do not know how I communicated that to him.

Q. Did you advise Mr. Zimmerman about it, or gentlemen representing the Prudential Insurance Company, that you were representing Mr. Jones? A. I think so, from time to time, I told him he was a buyer in case the Prudential Insurance Company bought it in.

Q. Did he tell you how much they were to get out of Jones for the property?

(Question objected to; objection sustained.)

Q. Did you have any correspondence with the Prudential Insurance Company with reference to the reports in getting the copies that they had? A. No, I had some correspondence in regard to whether they would be approved. I had several cases out in Indiana and each time I would ask him about those cases I would ask him about the accounts in this case.

Q. You were constantly urging him to get the accounts approved by the Prudential Insurance Company? A. I would not say constantly.

Q. When were you first advised they were approved so far as the receivers were concerned? A. I do not know as ever. I was advised by Captain Ingalls for the first time about a year ago that the originals were not on file here, any place. I thought they were in Judge Hough's office and I discussed it with General Florence that the originals were in Judge Hough's office or with the clerk, I did not know which, but I did not know until quite recently that they were not there.

Q. You knew that you would not be discharged under your bond until the reports were approved? A. That was the reason I wanted to get something done.

Cross Examination by Mr. Ingalls.

Q. Wasn't that statement that you had typed out prepared for me? A. May have been.

Q. When I asked for a statement with assets and liabilities to file your account? A. May have been, I have no recollection of why it was done, or when.

Q. You are familiar with the services of attorneys for receivers? A. Yes.

Q. You are familiar with my services in this matter? A. Yes.

Q. Have you anything to state about the reasonableness of the bill I have presented to this court? A. In view of the amount of money handled, and in view of the amount of time expended, I think that a reasonable fee should be allowed you, because you performed services in regard to the matter. I do not believe I know yet what you have asked for.

Q. \$1200.00 plus expenses, and \$65.00 is my expense.

A. Of course, I did not think that the \$1800.00 that Judge Hough allowed us was nearly enough, so that I think that you certainly earned that fee. That is my impression about it.

Q. That is all.

The Witness: I want to enlarge upon that a minute, if I may.

The Court: You may.

The Witness: There were twenty-two separate farms here, and while we produced an enormous amount of grain and sold what would now be thousands and thousands of dollars worth of corn, which is a lot of money, but when we would sell a bushel of corn then in Madison again we paid for the husking and the tenants would quit on us, and we would get six or eight cents a bushel after delivery, so the amount we received in actual dollars and cents was not at all commensurate with the labor for running the farms for the two years. However, I am satisfied with my fee.

Q. (By Mr. Haffenberg) How do you justify a fee of two or three thousand dollars paid you by Mr. Jones?

A. That is none of your business. I negotiate the fees with my clients and fix the fees in my office to suit myself.

Q. In view of the services rendered in the foreclosure matter, and the fee paid you by Mr. Jones, will you state how you justify the charge of two or three thousand dollars? A. I will answer you simply that I have a right to fix fees for my services when not appointed by the Court.

Q. Will you answer that question? A. I think I have answered it.

The Court: The Court is of the opinion that the witness has answered. When was this fee for allowance made by Judge Hough to the receivers?

The Witness: At the time we left the original accounts with him.

The Court: About what date was that, Mr. Simkins?

The Witness: If I can see one of the copies, it was some time in April, 1934.

The Court: Was an order entered to that effect?

The Witness: There was never any order put on the journal.

Q. What conversation was had with Judge Hough concerning the matter?

The Witness: Mr. Harrison was there, and they sat on opposite sides of the desk, and Mr. Florence and I were sitting out at the side of Mr. Harrison across the bench from the Judge, and they commented on the fact that he had ordered us to be paid \$100.00 a month each for expenses, and although we had travelled a good many miles we had had our expense account, and he would like to fix a fee that he thought was satisfactory, and he said to Harrison: "You write out what you think is the proper fee, and I will write what I think is the proper fee." In the first place, Mr. Florence and I had told him that we would be satisfied with whatever they fixed. We had filed our account showing the extent of our services, so they each—how they did this I will never know—wrote \$1800.00 on a piece of paper.

The Court: Mr. Harrison and Judge Hough?

The Witness: Yes, the Judge wrote the same amount and they pushed the slips across the table to each other.

The Court: After that meeting with Judge Hough, which took place some time in April of 1934, did you make inquiry within a reasonable time as to what had become of the accounts that Judge Hough had given to the Prudential Insurance Company?

The Witness: I was informed by Mr. Florence that he had seen Judge Hough, and that Judge Hough had not heard from the Prudential Insurance Company.

The Court: Do you know how soon after these reports were left with Judge Hough they were turned over to the Prudential Insurance Company?

The Witness: The same day.

The Court: Did you call Mr. Harrison's attention to that, and if so, how long a period after they were left with Judge Hough?

The Witness: He took copies the same day with him, Mr. Harrison was there, and he took copies of the accounts and stated he was sending them to the Newark office.

The Court: Do you know then why the original reports were turned over to the company after Mr. Harrison had taken copies?

The Witness: I do not think they ever were. I think they were put there on Judge Hough's desk. He pushed the receipts and original accounts over on the end of the desk with this statement: "When I get the approval of the Prudential Insurance Company on these accounts I will file them, because they are the only people who have the right to take exceptions to them."

The Court: The Court desires to ask Mr. Ingalls a question. When, if at all, did you take this matter up with Judge Hough to make inquiries about these accounts?

Mr. Ingalls: I took it up in January, 1934. They were left with Judge Hough in April, 1934. I did not know anything that had transpired. I did not know that there had been a meeting in Judge Hough's office in April. I did not know there had been any fees allowed, and I came down to check up the matter with the Court, and I could not find the reports. Then I asked about them, and Judge Hough told me that those reports had been turned over to the Prudential Insurance Company for audit, and they had not finished the audit.

The Court: That was in January, 1934?

Mr. Ingalls: Yes.

The Court: When, if at all, did you check it up any further?

Mr. Ingalls: I took it up in September, 1935, with Mr. Harrison why those reports had not been filed. And from that time on—Mr. Harrison reported, as I recall, that the company still had the reports, and then it was in September—August, 1936, I served notice on Mr. Harrison that I was going to ask for an order against the Prudential Insurance Company to

show cause why those reports were not filed. From that time on I kept busy in correspondence with Mr. Harrison to get those reports. First he told me he had the reports, then later in correspondence with me he said he only had copies of these reports.

The Court: Why didn't you present that matter to the Court?

Mr. Ingalls: I did. The Court was informed, and we worked out some agreement.

The Court: Didn't you suggest at that time that you were working out some arrangement about filing duplicate copies of these reports?

Mr. Ingalls: I had a report from Mr. Harrison saying those reports would be filed forthwith.

The Court: You never insisted on a hearing to show cause?

Mr. Ingalls: No, I did not.

The Court: In your third paragraph you state: "The Court will recall that several times this applicant came over to the Court and asked the Court to do something to force the matter to an issue and to compel the filing of the final account." What did you mean?

Mr. Ingalls: I did not get to see the Court. I talked with the Court's secretary about these matters, and he said he would.

The Court: The Court remembers you talked with the Court at least two times, and called it to the attention of the Court, but no formal request was made for an order to show cause, and it would appear to the Court that that is a mistaken impression as to what took place insofar as this Court is concerned.

Mr. Harrison: I would like to make a statement to the Court as to these reports. I have not been sworn, and if the Court wishes I will be sworn.

The Court: The Court understands you are requesting a continuance.

Mr. Harrison: I am, but I would like to explain about these reports.

The Court: The Court is going to give you the opportunity to be prepared. We are not going into

this in a haphazard manner. If there are any facts here that ought to be elicited we ought not to do it in a hodge-podge manner. The Court is going to adjourn this hearing and expects you to come in here and be prepared for a hearing on the application for the confirmation of the accounts of these receivers and also on the application for attorney fees and expenses. How long do you desire?

Mr. Harrison: If any charge of fraud here is filed so far as these reports are concerned I do not think it would take very long.

Mr. Haffenberg: As I take it, the Court intended to refer part of this matter to the Master?

The Court: The Court thinks the entire matter ought to be referred to the Master.

Mr. Haffenberg: May I suggest this, that the reference be made now, and all parties interested be ordered to produce all of their records pertaining to all receipts and disbursements in connection with the administration of this receivership, all payments made to the receivers or received from the receivers, all receipts from purchasers of the property, all records covering the purchases of these twenty-two properties, all the accountings for funds between the Prudential Insurance Company and the receivers, a statement of account by the Prudential Insurance Company of all monies owing to them at the date of the judgment, all costs, expended by them, all monies laid out by them in and about the foreclosure proceedings, all funds deposited with them as escrow funds, or otherwise, all monies advanced by them to the receivers, and all correspondence with the receivers or the counsel for the receivers. Now, we can proceed before a Master immediately and allow them the time to get this information.

The Court: Is there any objection?

Mr. Harrison: In the absence of some pleading, could the parties possibly know what to be prepared with?

Mr. Haffenberg: The Court has the right to ask for that information.

The Court: The Court is going to refer this cause, Gentlemen, to G. H. Butt, one of the Referees in Bankruptcy, as Special Master, with instructions to report generally upon the specified interests.

Mr. Haffenberg: And as to an order requiring the parties to produce those papers and accounts before the Special Master, will your Honor enter that order?

The Court: Insofar as it is pertinent and material to the confirmation of the receivers' accounts and the application for allowance of attorney fees and expenses.

Mr. Haffenberg: I think that is generally the rule that all papers in connection with the receivers' acts and doings leading up to the confirmation—

The Court: Yes.

Mr. Haffenberg: But I tried to go a step further, and I want to call the Court's attention, and my purpose in doing so. We have shown a contract here, we have shown funds handled by the Prudential Insurance Company, we heard Mr. Simkins testify that the receipts were deposited with Judge Hough, and I am trying to have an order that will be all inclusive that will inform us of all the acts and doings as to the finances under this receivership.

The Court: The Court is of the opinion that a general reference will give the Master a rather wide latitude in investigating all phases and angles of these cases.

Mr. Harrison: I understand from your Honor's order of reference that all matters pertaining to the issue, namely—

The Court: That will be left to the Master. The Court is going to make a general reference with instructions to the Master to report generally and upon specified issues. The Court thinks that reference is certainly broad enough to cover all legitimate matters that ought to be brought out, and the Court has faith enough in the Master that he will confine it to those matters that are material and pertinent to this inquiry.

Mr. Haffenberg: May I ask the Court's assistance from the standpoint of information under that general reference, does that permit the Master to go into the details of the sale, that is the foreclosure sales, and of course, the handling of the property?

The Court: As stated by the Court, insofar as it is pertinent and material to the confirmation of the final account filed by the receivers herein, and the application of counsel for allowance of fees.

Mr. Haffenberg: The receivers handle the management, and I am not certain—in fact, I have not had this experience before, and I do not know whether under that reference—but I do know this, that before your Honor we can go into any element that pertains to any fact of the administration either by the plaintiff the receivers, but whether under this general reference we can pry into the amounts of those properties purchased by the Prudential Insurance Company and their resales; if not, I presume we will have to create that issue and submit it to the Court.

The Court: The Court is not attempting to pass in advance on questions that might arise before the Master. The Court will be here, and I am sure the Master will present any questions to the Court that he deems proper, under the circumstances.

Mr. Haffenberg: I think that happens to be one of the questions under the circumstances.

The Court: The Court has the understanding that you are not prepared to proceed at this time?

Mr. Harrison: That is correct.

The Court: You may see the Master and fix a time for hearing that will be satisfactory to counsel and the Master.

And thereupon the affidavit in support of motion to confirm sale was marked for the purpose of identification as Exhibit No. 4.

HEARING

Before HONORABLE GAIL H. BUTT, as Master Commissioner,
commencing June 11th, 1937.

PRESENT:

MR. GEORGE FLORENCE, Receiver;

MR. O. C. INGALLS and DAVIS HARRISON,
*On behalf of the receivers and also counsel for
The Prudential Insurance Company of America;*

MESSRS. HAFFENBERG and HARLOR,
On behalf of Crites, Incorporated;

MR. GARRETT S. CLAYPOOLE,
On behalf of Mr. Simkins, individually.

Thursday Morning Session,
June 11th, 1937.

The Master: The Prudential Insurance Company of America vs. H. M. Crites and others, defendants, Nos. 927-948 inclusive.

This matter is here for hearing before the Referee as Special Master under a general order of reference made by the Honorable Mell G. Underwood, Judge of the United States District Court, and filed on June 2nd, 1937.

It appears that the circumstances of the case are somewhat as follows:

That Richard Simkins and George Florence, receivers, filed what they term copies of their accounts as receivers in the above named cases on or about February 19th, 1937; that an entry was made by the District Court bearing the file stamp date of May 13th, 1937, ordering and directing that a hearing be had upon the report and applications on the 2nd day of June, 1937, at ten o'clock; that all parties interested in said receivership be notified by the receivers of the date of said meeting.

It appears that the matter pending before the District Court at that time were the application of O. C. Ingalls,

associate counsel for the petitioner, for allowance of fees; the reports filed by the receivers and objections filed by the Prudential Insurance Company of America to the application of O. C. Ingalls for additional compensation. Was there also a written objection filed as to the reports of the receivers?

Mr. Haffenberg: No.

The Master: However, I believe there were oral objections made in that hearing, is that correct?

Mr. Haffenberg: There was oral testimony elicited with reference to the report. My understanding is that the hearing on June 2nd was the application for the approval of the report and accounts of the receivers.

The Master: I think that is substantially correct.

Also, I may make this statement before proceeding further. Doctor C. T. Grattig of Laurelville called me this morning and said that the physical condition of Mr. Simkins would not permit him to be present at the hearing today, and I have no further information on that subject except that Doctor Grattig said that he possibly would be able to attend the hearing within the next few days.

There was a subpoena duces tecum issued in this case to require Edwin F. Jones of Washington C. H. to be present today with certain records and books. That subpoena was served at a late hour and we have been notified that Mr. Jones cannot be present before twelve o'clock today, and will be present at that time.

Now, Gentlemen, with the statement I have just made I would like to know whether or not you desire to proceed with this hearing at this time.

Mr. Haffenberg: If the Court please, on behalf of Crites, Incorporated, in view of the information that has come to your Honor with reference to the illness of Mr. Simkins, Crites, Incorporated, desire an independent examination by a physician of Columbus, Ohio, at their own expense. Mr. Simkins was notified of the necessity of being here, as other counsel were, and are here. Mr. Simkins was notified that it was necessary to bring his records and correspondence here pertaining to certain matters pertinent to the administration of this receivership. Mr. Simkins knew also that counsel was coming

here from out of the city, knew their addresses, and unless there is something about that illness that has developed over night the least that might be said is that there was a common courtesy owed to counsel if he wanted to postpone it. Mr. Simkins knew that he was being charged with irregularity and I, therefore, move that if the Court desires to appoint a physician we will pay such expense, accompanied by a physician that Crites and Company will immediately retain, for the examination of Mr. Simkins. We will offer the Court the opportunity, if it so desires, to select an independent physician here. We will ask for the name of the physician and ask that a subpoena be issued forthwith, a subpoena on this doctor. We do not believe that this is a matter that should be treated quite as lightly by Mr. Simkins under the circumstances, and as I understand the first intimation that the Court had was the information received from the doctor this morning.

The Master: Approximately nine-thirty.

Mr. Haffenberg: About nine-thirty. So my first motion here will be for a forthwith subpoena for Doctor C. T. Grattig, and will ask the Court to grant that motion, please.

The Master: Are you asking that both of your motions be granted? In other words, if you are granted an examination by an independent physician do you still desire Doctor Grattig?

Mr. Haffenberg: I am taking that precaution in the event there is inability to examine Mr. Simkins. I will say this, if Mr. Simkins is examined by the physician appointed by the Court as well as that appointed by Crites and Company we do not care to have the other doctor here.

The Master: I am not sure that I understand one branch of your motion. Are you asking that a physician be named by the Court?

Mr. Haffenberg: That is right.

The Master: And Crites and Company will stand the expense?

Mr. Haffenberg: That is correct.

The Master: Or are you asking that we make use of two doctors, one to be named by you—

Mr. Haffenberg: I am asking that the Court select its own physician, for which Crites, Incorporated, will pay the expense. We will also send out our own doctor with him, so that the Court will have the benefit of two medical advisers in connection with Mr. Simkins' illness. I am also asking for a forthwith subpoena on Doctor Grattig, so that in the event that these two doctors are unable to examine Mr. Simkins for any reason whatever we can have Doctor Grattig come in and explain the nature of Mr. Simkins' illness.

Mr. Garrett S. Claypoole: If the Court please, Mr. Simkins asked me—

Mr. Haffenberg: Pardon me—

Mr. Claypoole: I am Garrett S. Claypoole, attorney for the A.I.U. Building, this city. I talked to him on the phone last night, and he said then that he expected to be able to be here, and asked that I meet him here this morning. However, if there is some doubt about the veracity of the doctor, or of Mr. Simkins— of course, I do not see the necessity of two or three physicians. I should think one physician appointed by the Court would be sufficient. I talked to him last evening. I do not remember the exact hour he called me on the phone, about seven o'clock.

The Master: Do you have any objection, Mr. Claypoole, to the granting of this motion for the examination?

Mr. Claypoole: No, I have no objection to having a physician appointed by the Court.

The Master: Are you of the opinion, Mr. Haffenberg, that the Master has any authority to take that action, or do you desire to present that motion to the Court?

Mr. Haffenberg: I believe the Master has. I might state this, from our research, I submit that the Master sitting in the capacity that he is sitting in here now under this reference sits in with almost like jurisdiction of the Court.

The Master: If those motions should be granted, you would then desire a continuance of this hearing?

Mr. Haffenberg: We will proceed with the other witnesses the best we can, although the receivers being involved, they should be the first witnesses, so as to enable

us to get certain information from them. I notice that Mr. Florence is present.

Mr. Claypoole: I have not any information any more than I gave you, but it strikes me—I do not know anything about your proceeding, I have not been in here, but if they have something else to proceed with I would be willing to make a telephone call and see what the present situation of Mr. Simkins is and report back to the Court.

Mr. Haffenberg: May we ask counsel whether he appears here as counsel for Mr. Simkins individually or as counsel for Mr. Simkins as receiver in the foreclosure matters of the Prudential Insurance Company.

Mr. Claypoole: The only information that I have is that Mr. Simkins asked me to represent him this morning, and said he would give me the information when I got here. I assume it is individually.

The Master: Gentlemen, we are going to take a ten-minute recess and at the end of that time the ruling will be made on your motions.

And thereupon a ten minute recess was taken.

(After recess.)

The Master: Mr. Haffenberg, how long will it take to complete this hearing, in your opinion, once we have the witnesses before us?

Mr. Haffenberg: I believe that would greatly depend upon the assistance they give us.

The Master: It will, of course, but have you any idea?

Mr. Haffenberg: Well, if they have brought their records and correspondence, and data, in I believe perhaps two days of testimony, and then we will have a check-up by the auditor we have retained.

The Master: It is your opinion that it will probably take two days?

Mr. Haffenberg: Two full days of hearings, yes.

The Master: With that in mind, I am going to adjourn this hearing over until three o'clock this afternoon.

Mr. Haffenberg: There are other witnesses. Mr. Harrison is here. He is one of the counsel for the receiver.

Mr. Florence is here and we would like to proceed with them. We also have arranged to have the bookkeeper for the receivers available, so that we can proceed right now. But I respectfully submit that I have submitted a motion here and would like a ruling from the Master upon that. All parties were notified to be here. Your Honor set the meeting to suit the convenience of all parties, and as I understand, possibly all parties are here.

The Master: That is true, Mr. Haffenberg, but there are some things that the Master would like to find out.

Mr. Haffenberg: These witnesses are available for the Master's convenience.

The Master: Sometimes you can find out things faster during the adjournment than you can at any other time.

Mr. Haffenberg: Can the Master state the reason for asking for the adjournment?

The Master: I may tell you that I am making that adjournment for the reason that I want to make a little independent investigation.

Mr. Haffenberg: As to the illness of Mr. Simkins?

The Master: That is one of the reasons.

Mr. Haffenberg: Has the Master any objection to our proceeding with Mr. Harrison in the meanwhile?

The Master: No objection, except this, I will not be present. I cannot be present.

Mr. Haffenberg: If your Honor will swear them in we will proceed with the examination. Your Honor will have this transcript together with the transcript of the hearing which took place before Judge Underwood.

The Master: I have this in mind, Mr. Haffenberg. If Mr. Simkins is ill, he should be given an opportunity to be heard. If he is not ill, he should be here and that is the question which primarily concerns me at this time.

Mr. Haffenberg: I fully appreciate the Court's position in that respect.

The Master: I am perfectly willing to take this matter up at three o'clock, if everything is in such form as we can proceed, and will grant counsel an opportunity to conduct the hearing as late into the evening as you desire.

Mr. Haffenberg: May I ask as to the examination of Mr. Harrison whether we may proceed after having Mr. Harrison sworn?

Mr. Ingalls: If the Court please, I prefer that the Master be present and take the testimony in this case.

The Master: I think in view of the circumstances it will be better.

Mr. Haffenberg: And, as I understand it, the Master will adjourn the hearing until three o'clock this afternoon permitting us to go on until we terminate so that we may pick up this time that is lost?

The Master: You may have as much time this afternoon as you desire.

Mr. Haffenberg: May I again ask as to the Master's ruling on the motion of Crites, Incorporated, for the purpose of obtaining the physical examination of Mr. Simkins?

The Master: That is reserved and will be pending until the hearing reconvenes, as to all three branches of the motions, or all three separate motions, whichever way you determine it.

Mr. Haffenberg: And as to the examination of Mrs. Lutz, has the Master the same objection to our proceeding with her?

The Master: That will be taken up at three o'clock. In other words, we are suspending everything until three o'clock.

Mr. Haffenberg: Mr. Ingalls, have you any objection to the examination of Mrs. Lutz, who, as I understand, was the bookkeeper, without the presence of the Master?

Mr. Ingalls: I am inclined to think that since this matter might constitute a reflection on the receivers that I would prefer that the Master be present here and observe the witnesses.

Mr. Claypoole: Representing Mr. Simkins, I concur with the last counsel's statement.

Mr. Haffenberg: Pardon me, will counsel representing Mr. Simkins state his reasons for the objection to the examination of Mrs. Lutz, the bookkeeper employed by the co-receivers, under oath, without the presence of the Master?

Mr. Claypoole: What is the question?

(Question read.)

Mr. Claypoole: I simply suggest that Mr. Simkins should be here during the entire proceeding.

Mr. Haffenberg: Any other reason?

Mr. Claypoole: No other reason.

The Master: Gentlemen, in order to clear the matter may say as Master sitting in any case I have never permitted testimony to be taken in my absence for any reason. I think that the delay here is not unreasonable, and, for that reason, I am going to suspend taking the testimony until my return.

Mr. Haffenberg: If the Master please, I have asked Mr. Harlor to phone Mr. Simkins at Circleville, and he will be in in just a moment, and I would like to have him make his report on his attempt to reach Mr. Simkins over the phone.

The Master: Any objection to stating that into the record?

Mr. Ingalls: No, no objection.

Mr. Claypoole: None.

The Master: You may have that statement made in the record and the reporter will take it when he returns.

Mr. Haffenberg: I wish this report of Mrs. Lutz taken. What time did you call the operator, just state the history of your attempting to reach Mr. Simkins?

Mrs. Lutz: I called the long distance operator at Circleville and talked to her.

Mr. Haffenberg: What time?

Mrs. Lutz: Just about ten minutes of eleven.

Mr. Haffenberg: Columbus time?

Mrs. Lutz: Yes, and she said that Mr. Simkins had put in no calls this morning on the phone. She called his mother's house, and his mother said that he had gone to a doctor, but she did not know which one, and central proceeded to call all the doctors' offices and he had not been to any of them.

Mr. Ingalls: That is the doctors within the city of Circleville?

Mrs. Lutz: Yes, so I left my telephone extension number downstairs, and if he puts through a call at any time today she is calling me to it.

Mr. Haffenberg: Does Mr. Simkins live with his mother?

Mrs. Lutz: Yes.

Mr. Haffenberg: She told you then that he was not home, when you called?

Mrs. Lutz: Not home.

Mr. Haffenberg: And he had left the house early in the morning?

Mrs. Lutz: She did not say what time. She said he had gone to a doctor.

Mr. Haffenberg: This morning?

Mrs. Lutz: This morning.

Mr. Haffenberg: And he was not home then when you called?

Mrs. Lutz: No.

Mr. Haffenberg: Nor was he in any hospital? Did she advise you of his being in a hospital?

Mrs. Lutz: No, she said he had gone to a doctor.

And thereupon a recess was taken until three P.M. of same day.

Afternoon Session,
June 11th, 1937.

The Master: Now, Gentlemen, I am going to ask whether anyone present has any report to make with reference to Mr. Simkins?

Mr. Haffenberg: I desire to advise the Court that Mrs. Lutz attempted to phone him at ten minutes to eleven this morning and she was advised—she called his mother's house and she was advised that his mother said that he had gone to a doctor but she did not know which one, and central proceeded to call all the doctors' offices, and he had not been in any of them. He put in no calls this morning. He left this morning and had not returned up to the time that she called, and he was not at home.

The Master: Gentlemen, I may say for the purpose of the record that, as I stated this morning, I was going to make some little investigation on my own account, and did. I talked personally to Doctor Grattig of Laurelville, Ohio, Mr. Simkins was in his office this morning, and Doctor Grattig assured me professionally that Mr. Simkins was not in physical condition to attend a hearing today. Acting upon that information I am going to overrule the

three motions or the three separate branches of the motion filed with the Court this morning by counsel, and I am going to instruct counsel for Mr. Simkins to present to the Master not later than tomorrow a written statement from Doctor Grattig as to Mr. Simkins' physical condition. It will be stated that that should be in the hands of the Master not later than ten o'clock in the morning. As counsel for Mr. Simkins is present, we will proceed with the hearing.

Mr. Haffenberg: Then I take it that that statement will be made a part of this record?

The Master: It may be, and it will be so ordered.

Mr. Haffenberg: As to any further examination beyond those witnesses that we examine today, we can adjourn until Mr. Simkins attends personally?

The Master: He will be required to attend personally and you will be given an opportunity to examine him.

And also:

MRS. MARION R. N. LUTZ, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Mr. Haffenberg: If the Court please, I desire to make this statement. In the hearing before Judge Underwood Mr. Simkins, one of the co-receivers, stated that the records were handled by Mrs. Lutz, and he promised to bring her in. He not showing up, we have contacted Mrs. Lutz, and we are going to ask the Court to call her in connection with the hearing on the Master's report. I do not know as it makes any particular difference whether she is one person's witness or another in a hearing of this kind, but I am merely explaining to the Court our reason for having produced Mrs. Lutz.

The Master: Before you begin with this witness, will the witness please state her full name?

The Witness: Marion R. N. Lutz.

Q. Mrs. Lutz, were you employed by Mr. Florence and Mr. Simkins, receivers in the foreclosure cases instituted by the Prudential Insurance Company against H. M. Crites? A. I was.

Q. From when to when? A. From November 18th, 1932, and then I left along in November, 1934, to campaign, but not long, then I went back, and from that time—

Q. That period from November, 1932—pardon me for cutting you off, but you covered the one period from November, 1932, to November, 1934, were you continuously in their employ? A. Yes.

Q. Where did you work? A. In Mr. Simkins' office.

Q. In Circleville, Ohio? A. In Circleville, Ohio.

Q. Were the books and records of this receivership kept there? A. Yes.

Q. Did you have charge of the books and records of the receivership? A. Yes, I did.

Q. State just what your duties were in connection with your employment by these receivers. A. I merely recorded the amounts of money that were brought into the receivership and made out the checks that were later signed by them, Mr. Simkins and Colonel Florence, and then I showed the disbursements, of course, on the books.

Q. Showing you for the purpose of refreshing your recollection the book designated down here on its front page No. 1, cause 935, I will ask you whether this is a book in which you recorded entries? A. Yes, this is the book.

Q. And are the entries appearing all in your handwriting? A. No, they are not all mine. The front was made out before I went in, and the first entries put on were before I went in, nine months.

Q. Approximately nine months? A. That is right.

Q. This receivership, I believe, was February, 1932, did you have access to the records prior to November, 1932? A. No, I saw them for the first time when I went into the office.

Q. November, 1932? A. November, 1932.

Q. What was the nature and condition, just describe to the Court the best you can the records as they existed

at the time you came in with reference to this receivership? A. There were records put in probably up through June, some of them, and then I had the bank deposit slips, and, of course, the check stubs were in the check book, and I filled in the books from June on up to the date I went in. I only had the records of the deposit slips and the check stubs to follow.

Q. Do you know who handled the records of this receivership prior to your entering into the office? A. Mrs. Walter Abernathy of Circleville.

Q. Did she ever confer on any of the records with you to acquaint you with the conditions of the records prior to your coming into that office? A. No; I never talked to Mrs. Abernathy.

Q. Did you ever handle any of the cash of the receivership? A. Only during one period, and that was the period of March 4th when the banks were closed. There were some monies came into the office that day from the sale of something, I do not recall just what, and that money I put in a box in our safe, and that was the only time I ever handled any money.

Q. You mean during the bank holiday? A. During the bank holiday.

Q. What was the total amount that you handled? A. I have not any idea.

Q. Two, or three, or four hundred dollars? A. No, not to exceed \$150.00 anyway.

Q. A comparatively small amount of cash. Whom, to your knowledge, handled all of the cash with reference to this receivership? A. It was taken in to Mr. Simkins' office, and then it was turned over to Colonel Florence, and he brought it to the City National.

Q. By whom was it turned in to Mr. Simkins' office? A. By the tenants on the farms.

Q. Did any of those tenants transmit to Mr. Simkins through you? A. No.

Q. Who made out the receipts? A. I made out the receipts.

Q. Upon whose instructions? A. Colonel Florence and Mr. Simkins.

Q. Did you make out all the receipts? A. There might have been one or two, if I did not happen to be around. I made all that I was required to, when there.

Q. Were you there at all times when money was received by Mr. Simkins? A. When I was on vacation, off and on, money might have come in, but at other times I was always there.

Q. Were you paid by the receivership? A. Yes.

Q. By receivership check? A. Yes.

Q. By whom were the checks signed? A. The checks were signed by Colonel Florence and Mr. Simkins.

Q. Do you recall the time when the properties were sold at the marshal's sale July 1st, 1933? A. I recall the sale. I do not remember the date. I was not at the court house when it was sold.

Q. You were in the office of Mr. Simkins? A. Yes.

Q. You were in the office constantly from that time until November, 1934, excepting the week or two that you were off? A. Yes.

Q. What monies were handled by the receivers after the sale? I will now ask you to refer to the dockets, books, and memorandums, that have been produced here by the receiver, and tell the Court. A. There seems to be nothing in this book.

Q. Will you look through each of these books, Mrs. Lutz, please, and specify the book numbers, and what, if any, funds were handled by the receivership after July 1st, 1933. Referring to book No. 1, did you say there was anything in that? A. There does not seem to be anything in that.

Mr. Haffenberg: We will ask Mr. Florence to check up on this, so that if there is any correction of the witness's testimony he may make it now.

A. Was that July 1st, '33?

Q. July 1st, 1933. A. We had a refund of United States Revenue stamps; sales of oats. You do not want every account?

Q. No, just tell us the books in which the entries appear. A. In cause 936—

Q. Call the books, numbered from 9 to 11. A. Those are the numbers of the farms, they are in cause 936 and 937.

Q. You can describe it better by cause number? A. Case number, because in Pickaway County there were eleven.

Q. All right. A. Cause No. 936 we received money by refund, United States Revenue stamps, by sale of oats—

Q. Referring to the book that is now before you, are there entries appearing in August of 1933? A. Yes.

Q. September of '33? A. Yes.

Q. October of '33? A. No, not until April, 1934, in the sale of wheat.

Q. From September to April no entries appearing there? A. Yes, that is right.

Q. What entries are there in 1934? A. The sale of the wheat on the farm was \$194.97.

Q. Any other entries after that in 1934? A. No, that is the last entry.

Q. Does that cover one of the farms? A. It covers two of the farms, 9 and 11, they are down.

Q. Give us that history in connection with the others.

A. In cause 937, there are entries after July 1st, 1933, advancements as per order of court for payment of taxes. I do not know what that was.

Q. You say you do not know what that was. Is that entry in your handwriting? A. Yes, that entry is in my handwriting, but I mean I do not know the cause of it. Evidently on my slip there was an advancement by order of court, I do not know where that money came from.

Q. That was for taxes? A. Payment of taxes.

Q. Give us the months thereafter. A. There are items in August, September, and April, of 1934.

Q. That is August and September of '33, and April of '34? A. Yes.

Q. Any after that? A. None after April.

Mr. Ingalls: Are you going to put those books in the record?

Mr. Haffenberg: They are all public records.

Mr. Ingalls: The books are the best evidence. You could simply call attention to one or two, but you should not take time to go into all of this.

Mr. Haffenberg: There are twenty-two cases, twenty-two reports in the hearing for the approval, and the application is on these twenty-two mortgages, and as I understand it, this is the manner in which they have kept the records of these cases. She is merely describing that.

The Master: You may proceed.

The Witness: Cause 938, received money in July, July 15th, advancement for taxes by sale of wheat, and through August—

Q. Give the month and year. A. Of 1933, September, 1933, and April of 1934.

Mr. Ingalls: If the Court please, we could admit all those books in evidence, without the necessity of taking all of this time. If there is no objection to any of the entries, we are willing that they all be admitted in evidence.

Mr. Haffenberg: I take it that they all are a part of the Court's record.

The Master: That is true.

Mr. Ingalls: We admit all the entries that are in there.

The Master: Have they been admitted into evidence?

Mr. Haffenberg: I have not offered them in evidence, but they have been produced here by the receiver, so I take it they are the Court's records for that purpose.

The Master: Do you intend to ask that they be admitted?

Mr. Haffenberg: I am not going to state that so far as the correct entries appearing therein. This lady comes in from six to seven months after the receivership started. She was a lady that was tendered by Mr. Simkins, the receiver, to explain this record. This will all be a matter of computation, perhaps, and accounting.

The Master: Is it your intention to put into the record the material as to each book?

Mr. Haffenberg: No, that will be worked up by the auditor.

The Master: Do you intend to continue this line of questioning?

Mr. Haffenberg: I had in mind to have her go through the twenty-two cases, that is if these books cover the twenty-two cases. If they want to admit that there were no entries made in those books after April, 1934—in the first place, I do not think the admission would be binding on us if the receiver actually did—it is a matter to prove it. If this lady had charge of the records she can tell the Court what she did.

The Master: What is your objection?

Mr. Ingalls: My objection is that these books all speak for themselves.

The Master: That is true.

Mr. Ingalls: And the mere fact that there are no entries in these books, that there are no entries after April, 1934, we admit that. There is not any need of Mr. Haffenberg's going into that proposition. If there are no entries, we admit that, so it is not necessary to take all this afternoon on these books.

The Master: Personally I would much rather have the information in the record than in those twenty-two ledgers. You will be allowed a reasonable time to bring out the facts from this witness.

The Witness: In cause 939, there was money paid in July 3rd, and the 5th, and the 15th.

Q. Just give the month and the year? A. August of 1933 and September, 1933. No entries in 1934.

Cause 940, July of 1933; August of 1933, September, and that is all.

Q. September of 1933? A. Yes.

(Thereupon a recess was taken of five minutes.)

Mr. Haffenberg: If the Master please, apparently the witness misunderstood the question directed to her, and may I suggest, and I believe it is agreeable to Mr. Ingalls, that the witness prepare a memo-

random covering all of these cases showing the entries, both for receipts by way of months after July 1st, 1933, and disbursements, and we will accept her statement as being the statement that she would make on the stand with reference to those entries.

The Master: Is that agreeable?

Mr. Ingalls: Yes.

The Witness: You want me to go back through the books that I have already gone through?

Mr. Haffenberg: Just make up a tab at your convenience. Mrs. Lutz, did you do any other work for Mr. Simkins or for Mr. Florence?

A. Only for Mr. Simkins, I did his stenographic work.

Q. Did you handle any of his books? A. No, none of his personal books.

Q. Did you handle any of his correspondence with any of the parties connected with or related to the Crites matter? A. Yes, sir.

Q. Who? A. I corresponded with the Prudential Insurance Company.

Q. Never mind, I will get that more pointed later.

You received a salary in addition to that which you have just described from Mr. Simkins? A. Yes.

Q. Are you familiar with Mr. Simkins' books of records covering his accounts for the year 1933? A. No.

Q. Did you handle any of his books other than those as receiver? A. No, I did not.

Q. Are you familiar with his income and disbursements for the years 1933 and '34 other than as received from the Crites farms? A. I have no records.

Q. Do you know Mr. Edwin F. Jones, Washington, C. H.? A. Yes, I do.

Q. When did you meet him? A. When he came into Mr. Simkins' office.

Q. Was that while you were in the employ of the receivers? A. Yes.

Q. Did you ever meet Mr. Charles Sawyer of Cincinnati? A. Yes, sir.

Q. When? A. When I was in the employ of Mr. Simkins in the office, but I don't know when.

Q. Can you tell us when was the first time you met Mr. Jones? A. I can't say the definite date.

Q. Can you recall when the marshal's sales of the property took place, July 1st? A. Yes.

Q. Was it before or after that? A. It was not before, I think. I don't know. I just don't remember.

Q. Do you know when you first met Mr. Sawyer? A. I met him in Mr. Simkins' office, but I don't know any dates. I have not anything else to recall those dates.

Q. Was there a diary kept in Mr. Simkins' office of the calls made on him? A. I merely got the statement from the telephone office and I knew from going down through the list that they made calls to the people with reference to the Crites receivership. I checked those off, and took them off of his bills.

Q. How would you handle those calls? A. Paid by check.

Q. Receivers' checks? A. Yes. I noted them on the calendar pad nearly always when the calls were put through, if I put them through.

Q. Referring now to long distance calls to Mr. Sawyer in Cincinnati, can you state now whether Mr. Simkins personally paid for them, or the receivers paid for those? A. I would not like to say because I don't know, I don't remember.

Q. Where would you go for that information? A. I probably would have to go back through my stubs. I have the check stubs.

Q. Have we the check stubs here? A. I kept a record on the back of my stubs of a good many things. The cancelled checks would not show.

Mr. Haffenberg: Can Mr. Florence tell us where the check stubs are?

Mr. Florence: The last I saw of them they were in Mr. Simkins' office. I have not seen them since.

Q. When did you last see the check stubs, Mrs. Lutz? A. Probably when I was in the office, but I do not believe I saw them after he closed this matter up, and I finished writing the accounts.

Q. Can you state for certain whether or not any of those charges for long distance calls to Mr. Sawyer were charges paid for by the receivership? A. I couldn't state that.

Q. With reference to Mr. Jones, state whether or not long distance calls were charged to the receiver? A. I couldn't state definitely.

Q. Did you check up the various calls on bills received from the telephone company? A. Yes.

Q. Were those telephone bills some that might be personal with Mr. Simkins other than the receivership? A. They would all show on one statement.

Q. Where did you make a record of the disbursements you made for the telephone calls? A. I know that after I took out the receivers—the receivership calls I listed those, and I thought on the back of the check stubs, and then I also, if I remember correctly, I think I listed the division of them to each farm.

Q. Would you have an entry? A. Yes, but that would not say where the call went to.

Q. Those books will show the telephone calls in 1933, the month of July, would they not, and in June? A. On this one particularly, 940, I have a telephone number, Citizens telephone as per statement, \$1.07.

Q. What farm did that cover? A. Covers farm No. 11, Pickaway.

Q. Referring now to Madison County, will you look through that for the months of June and July, 1933?

A. In June I paid the telephone company as per statement, and July also, \$1.07, so I evidently divided them equally in this case.

Q. In other words, you apportioned the charges against each one of the farms? A. Yes.

Q. Would that represent one-eleventh of the charges against the Madison County farms or one-twenty-second? A. One twenty-second.

Q. Of the total charge? A. But I believe I apportioned those. Of course, there were some charges only to the Madison County farms, and those were divided by eleven.

Q. What was the nature of those charges? A. I am unable to recall.

Q. Would the telephone charge enter into it? A. That would be an even charge. In Madison County, here, for instance, we had Rasacco Farm Telephone Company, those calls must have been made in Madison County, and we received a statement, and that was only divided by the Madison County farms. None of that was charged to Pickaway. That is just one item.

Q. What was that amount of that telephone in Madison County that you just mentioned for a dollar and some cents? A. It was forty-three.

Q. That \$1.43? A. No, just 43¢ for this particular arm.

Q. What date? A. April 29th.

Q. I asked you for June and July. A. I was merely trying to show you—

Q. Just June and July, please, Mrs. Lutz. A. There were not any telephone calls. I can give you another example. Madison County auditor, transfer of deeds.

Q. No, we will get down to the recording of deeds later. Just come down to the telephone charges for the months of June and July. A. On July 8th.

Q. Citizens Telephone Company. A. \$1.07.

Q. Does that appear in the Madison County entry? A. Yes, it does.

Q. And is shown on the book covering cause 939. Does that appear in the Pickaway County farms as well?

A. Yes, appears in Pickaway County.

Q. Coming down to the question of recording of deeds, did the receiver pay out for the recording of deeds? A. Yes, he must have.

Q. What deeds were those; do you know whether they covered chattel mortgages? A. No, I have a record here of stamps, recording of deeds, and transfer of deeds.

Q. How much for stamps? A. \$11.50.

Q. Was that on one farm? A. \$9.27.

Q. Where can you go to get the original information with reference to those stamps? A. You mean the total amount of them?

Q. As to the entry you have now just recited. A. The cancelled check would be all that I would have. The cancelled check would be the only record I would have.

- Q. Were you advised as to what deed that covered?
- A. No.
- Q. Or what the nature of the deed was? A. No.
- Q. As to whom the parties in the deed referred to? A. No. I have only these listed, and handed to me, with the number of the farm to which they applied.
- Q. Did you have any slip or authorization from Florence and Simkins for the purpose of issuing a check for that? A. I undoubtedly would have had or it would not have been issued.
- Q. As a matter of fact, you issued checks, did you not, on authority of those gentlemen, without any other question involved? A. I wrote the checks, and they were signed, and handed over to them afterwards.
- Q. You would make up the checks at the instance of either Mr. Simkins or Mr. Florence, is that correct? A. Yes.
- Q. And they would tell you how to make them up?
- A. Yes.
- Q. Do you know of any deeds handled by the receivers in the months of July or August, 1933? A. No.
- Q. Were any deeds shown to you? A. No.
- Q. Did you buy the stamps? A. No.
- Q. Do you know what stamps they were? A. No.
- Q. Do you know what they were for? A. No, I only wrote the checks.
- Q. You made that entry there because you were so instructed by the receivers? A. Yes.
- Q. That stamp item there amounted to twenty-two times the figure you just read off? A. I imagine if you would look through the records that each one would be a different amount in the cases of the stamps.
- Q. Then you rather allocated your charges by the value of the farms involved? A. I do not know if I looked through the books for that.
- Q. Did you have one general ledger covering this receivership that showed all the credits and debits? A. No, but I made up a statement at the end covering all debits and credits, but do not have it here.
- Q. Was that statement taken off of these books? A. No, that statement was taken from the bank deposit slips and from the check stubs.

Q. In other words, you made a recap of the bank deposit slips and of these stubs? A. Yes.

Q. And that covered transactions prior to your connection with the receiver as an employee? A. Yes.

Q. Did you know of your own knowledge as to the correctness of any of the entries appearing in the records and the papers submitted to you with reference to receipts or disbursements by the receivers prior to your contact with them? A. I assumed that they were correct, because they were bank deposits, and the check stubs that were in the check book.

Q. That is you took them merely on their face? A. Yes.

Q. And was any explanation given to you by the party or parties who originally kept those records? A. No.

Q. From the time you took charge you were familiar with each of the transactions for which you issued or disbursed any funds? A. I knew by writing the check what it was for, although I did not know all about it, just as in the case of the deeds, I knew I had a check to write for it, and the stamps for it, but I did not know anything about it.

Q. You did not know anything of the details? A. No.

Q. In other words, you were told to make a check out for so and so, and you made it out? A. Yes.

Q. Further than that you were not familiar with it? A. No.

Q. Did you transcribe any dictation or handle any correspondence to Mr. Sawyer in Cincinnati in connection with these properties? A. No.

Q. To Mr. Jones? A. No.

Q. Of Washington C. H.? A. No.

Q. Are you familiar with the fees, commissions, or compensation received by Mr. Simkins during the time you were in his office?

Mr. Claypoole: I object, unless it was in reference to the receivership.

Mr. Haffenberg: I just asked first if she was familiar.

Mr. Claypoole: I will withdraw the objection, if she is just to answer yes or no.

The Witness: No, I was not familiar.

Q. Did you know the relationship that Mr. Simkins had with any of the parties dealing with these Crites properties that were involved in the foreclosure? A. No.

Q. Did you know that Mr. Harrison was his counsel? A. I thought Mr. Harrison was counsel for the Prudential Insurance Company.

Q. Did you also understand that he was counsel for the receivers? A. No, sir, I don't have that in mind.

Q. Did you know that Mr. Ingalls was counsel for the receivers? A. I knew Mr. Ingalls was in the office, but I did not know that he was counsel.

Q. Did you know that Mr. Florence was his associate receiver, his co-receiver here? A. To Mr. Simkins?

Q. That Mr. Florence was associate receiver? A. Yes, with Mr. Simkins.

Q. Did you know Mr. Simerman? A. Yes, I met him in Simkins' office.

Q. Did Mr. Simerman represent the Prudential Insurance Company? A. To my knowledge.

Q. Did you know Mr. Little? A. Yes.

Q. Did he represent the Prudential Insurance Company? A. It was my understanding.

Q. Will you state whether or not as an employe of the receivers, you know that Mr. Simkins represented Mr. Jones in connection with any of those properties prior to July 1st, 1933?

Mr. Claypoole: I object on the ground that it is immaterial.

The Master: Objection overruled.

The Witness: I did not know it.

Q. Did Mr. Simkins inform you that he was representing Mr. Jones in connection with any of the properties involved in these foreclosure cases? A. No, sir, he didn't give me any idea about it.

Q. Did Mr. Simkins advise you that he was being paid by Mr. Jones for any services rendered by him in connection with the foreclosure properties? A. No, sir, he did not at that time.

Q. When, if ever, were you first advised by Mr. Simkins of any compensation received or claimed to be received by him from Mr. Jones?

Mr. Claypoole: We object to that question on the ground that it is immaterial. It has nothing to do with the receivership.

(Question read.)

The Master: The question in that form is objectionable.

Mr. Haffenberg: For representing Mr. Jones in connection with any act or doing regarding the property involved in the foreclosure cases.

Mr. Claypoole: We want to object also for the reason that Mrs. Lutz was acting as confidential secretary of Mr. Simkins. That is true, is it not, that you were the secretary of Mr. Simkins?

The Witness: Yes.

Mr. Haffenberg: That would not make any difference under any circumstances.

The Master: The objection will be sustained as to the form of the question.

Q. Did Mr. Simkins ever advise you that he received any compensation from Mr. Jones?

Mr. Claypoole: We object.

Q. For services rendered Mr. Jones in connection with the property involved in the foreclosure cases?

Mr. Claypoole: We object.

The Master: Can't you make this definite as to the matter of time? That answer might be, I take it, for a period of ten years before the action was started.

Q. Since July 1st, 1933, to date.

Mr. Claypoole: I object unless this is in reference to a sale by Simkins as receiver. I am certain it has nothing to do with this matter. If it is in reference to something private, a private sale, or some sale that was made in some transaction that was outside of the receivership, why, we do not see that it has anything to do with the matter. If he wants to ask the question as to whether or not he received any compensation in connection with the sale as receiver, then that is different.

Mr. Haffenberg: That is a matter for this Court to determine and pass upon, as to whether or not he received it in a proper or improper manner, but the Court must first be advised of the fact.

The Master: Is it your contention that if there was a sale of this property before foreclosure was completed that it would be improper for the receiver to participate in that sale?

Mr. Haffenberg: You have asked a question that has a lot of law about it, but I will answer it this way. In this particular matter where we identify the receiver with the negotiations prior to the marshal's sale, I believe it is pertinent. If there is any question about that are you satisfied?

The Master: He may answer, and we will strike it out if it is not admissible.

Q. When were you first told by Mr. Simkins of any fees received from Mr. Jones?

Mr. Claypoole: Let the record show the objection.

The Witness: Wednesday night.

Q. That is night before last? A. I do not know the date.

Q. State what was said.

Mr. Claypoole: That was night before last?

The Witness: Night before last was the first time.

Mr. Claypoole: We move that the answer be stricken out.

The Master: For what reason?

Mr. Claypoole: The statement here is that it was just a day or two ago that she was told as to some receipt of fees.

Mr. Haffenberg: I have asked the witness when she had heard from him as to this, and she states night before last. You objected to it. The objection will stand. Of course, it has been overruled and whatever rights you have you will get. My next question will be, for your information, what was said by him. You may make your objection, and let the Court strike it out afterwards if he finds it is incompetent.

Mr. Claypoole: All right.

A. Do you want me to tell the conversation?

Q. Yes, with reference to fees. A. I was just told, or I had been asked if I had heard a rumor or knew as to what he had received, and I said No, I had no way of knowing, that I did not know, and he said: "I don't mind telling you." He said "\$2700.00." Of course, that could have been just any amount.

Mr. Claypoole: I move to rule the answer out.

Q. And that was the amount he said he received from Mr. Jones? A. Yes.

Q. That is the first time you heard from Mr. Simkins, or learned from him of any connection between him and Mr. Jones with reference to fees?

Mr. Claypoole: I move to strike the answer out.

The Master: As to Mr. Claypoole's motion it will not be determined at this time, but will be determined later.

Mr. Haffenberg: If he wants to shorten it he can let it all go in subject to his objection, if that will help him out.

Q. Do you know of any correspondence between Mr. Simkins and the Prudential Insurance Company with reference to Mr. Jones' interest in the Madison County farms?

A. Not in reference to the farms.

Q. Did you know of any correspondence with Mr. Simkins or Mr. Florence and the Prudential Insurance Company or their counsel, or representatives, with reference to any prospective bidder on any of these farms? A. I do not recall any correspondence in reference to that.

Q. You were in the office constantly? A. I was in the office constantly.

Q. Do you recall a party coming in the office and inquiring about the purchase of these farms? A. I know of parties coming to the office, but I heard none of their conversation.

Q. They were all referred to Mr. Simkins? A. They were all referred to Mr. Simkins.

Q. Were you given instructions as to the handling of those prospects? A. No, after they came in the office they were shown in Mr. Simkins' office.

Q. In the absence of Mr. Simkins were they referred to the Prudential Insurance Company? A. I do not think they had any bidders that were referred to the Prudential Insurance Company.

Q. Were they referred to Ingalls and Selby's office? A. No, I do not recall of referring anyone.

The Master: May I ask the witness a question?

Mr. Haffenberg: Certainly, your Honor.

The Master: Will you state how many rooms you did have as offices when you were employed by Mr. Simkins?

The Witness: Two rooms.

The Master: Where was your desk with reference to Mr. Simkins?

The Witness: In the outer office, it was not in Mr. Simkins' office.

The Master: Where were the conferences usually held between Mr. Simkins and clients of any kind?

The Witness: In his office.

The Master: You were never present when he conferred with either prospects or clients?

The Witness: No.

Q. Do you know of any fees received by Simkins from the Prudential Insurance Company? A. No, only the salary that the judge allowed him.

Q. That you made a record of? A. Yes.

Q. You say the judge allowed him, that is from information you received from Mr. Florence and Mr. Simkins? A. I was not in court.

Q. You did not see a copy of the order? A. No.

Q. Nor did they tell you the date it was entered? A. No.

Q. Are you familiar with the charges kept by Mr. Simkins in the conduct of his office in the year 1933? A. I do not think he set down the charges in the book.

Q. Did you transcribe or write up any statements on the first of each month? A. He did not send out statements.

Q. Did he have any other help in that office? A. No, except an occasional girl he called in when I had extra work.

Q. Anything pertaining to just finances or disbursements in his own affairs, did he handle that personally?

A. He handled that himself.

Q. He was rather secretive, is that right? A. It would seem so.

Q. You had nothing to do, then, with making up any charge on his personal accounts? A. Not with his personal finances.

Q. You had nothing to do with making up any charge against Mr. Jones at Washington Court House, or Mr. Sawyer of Cincinnati? A. No, sir.

Q. Or Mr. Johnson of Cincinnati? A. No.

Q. Or Mr. Proctor of Cincinnati? A. No.

Q. Mrs. Lutz, were you in Columbus a few days prior to July 1st, 1933? A. I would not know.

Q. Mrs. Lutz, I will show you this affidavit of Mr. Harrison, and the exhibits, according to their copy, and your name. Will you state whether or not you signed such a paper at or about the time the exhibit bears date? A. Yes, I signed my name to this.

Q. To the original of that exhibit? A. Yes.

Q. Will you explain to the Court where and when you signed it, and the circumstances? A. I was called in to Mr. Simkins' office to witness Edwin Jones' signature to this.

Q. Was Mr. Jones there at that time? A. Yes, Mr. Jones was there at that time.

Q. Was there anybody else present at that time? A. Not that I recall.

Q. Do you remember Mr. Simerman being there at the time? A. Mr. Simerman was in the office, but I don't know that he was there when this was signed.

Q. Was any representative of the Prudential Insurance Company there at that time? A. If any were there it would have been Mr. Simerman, I imagine.

Q. Did you transcribe that agreement or typewrite the agreement? A. No, it was not written by me.

Q. Was it prepared at the time it was shown to you for your signature? A. I knew nothing about the agreement. I do not recognize the agreement at all, but I do remember witnessing Edwin Jones' signature.

Q. Was it at or about that time? A. It was during the pendency of the sales.

Q. Was Mr. Simkins there at the time? A. Yes.

Q. Did he likewise witness the agreement? A. His name is here.

Q. Was he there when you witnessed it? A. Yes.

Q. Was that in Circleville? A. Yes.

Q. If there had been any other date on there you would have noticed it at the time, that is any date other than the date you witnessed it? A. I perhaps would have. I only watched him write his name, and signed my name, and attested his signature.

Q. Who asked you to sign that? A. Mr. Simkins.

Q. He just asked you to go in the office and witness Mr. Jones' signature to a document? A. Yes.

Q. And as far as you know this is a copy of that document? A. As far as I know.

Q. Were you ever at a meeting in the Neil House in Columbus at which Mr. Simkins and Mr. Jones were present? A. No.

Q. This exhibit just shown you is the exhibit marked No. 4, is that correct? A. Yes.

Q. Do you know of any file being made up in Mr. Simkins' office about Mr. Jones? A. No, we had no file.

Q. You know how a lawyer conducts his office, makes up a file for cases pending? A. Yes.

Q. Do you know of any file being made up for Mr. Proctor? A. No.

Q. Or Mr. Johnson? A. No.

Q. Or Mr. Sawyer? A. No.

Q. If there had been any made up you would have known it? A. Yes.

Q. You had charge of filing of all the details in connection with the office? A. Yes.

Q. Did you know of any services being rendered by Mr. Simkins for Mr. Jones? A. No.

Q. Or for Mr. Proctor? A. No.

Q. Or for Mr. Sawyer? A. No.

Q. Was Mr. Harrison at the office during the pendency of these foreclosure proceedings? A. Mr. Harrison was in the office once, but I can't remember when.

Q. Was Mr. Ingalls in the office during the pendency of the foreclosure proceedings? A. Mr. Ingalls was in the office, but I don't remember the time, whether before or after.

Q. Or Mr. Selby? A. I don't remember Mr. Selby.

Q. Did Mr. Florence come in there? A. Mr. Florence was in there every week.

Q. Did you draw up any other papers or contracts between Mr. Jones and Mr. Simkins? A. No, I drew no contracts between the two of them.

Q. Did you know of any contracts existing between either of them or these two gentlemen, Mr. Jones and Mr. Simkins? A. No, I knew of no contract.

Q. At the time you witnessed the document attached to Exhibit No. 4, was there any check shown you at the time? A. No check in evidence, that I saw.

Q. How were the deposits of the receivers handled? A. Colonel Florence brought them to Columbus, and deposited them in the City National Bank.

Q. Did you make up the deposit for him? A. I think not. He always brought a duplicate back to me from the bank.

Q. The evidence that you had as to it was what was contained on the duplicate slip? A. Yes.

Q. From that you made up your entries in the books? A. Yes.

Q. Did you hand any of these funds to Mr. Florence to deposit? A. No.

Q. As I understood you, you stated before you handled no funds except during that period of the bank holiday? A. No.

Q. Whenever you made out checks it was at the instructions of either Mr. Simkins or Mr. Florence? A. Yes, they were nearly always written when both of them were in the office.

Q. I understood you to say this morning that Mr. Zimmerman was in Mr. Simkins' office at the time this contract was signed? A. I stated I remembered of his being there at the same time that Mr. Jones was, but I don't remember whether it was the day the contract was signed.

Q. How many times was Mr. Simerman in Mr. Simkins' office when Mr. Jones was present? A. Two, anyway.

Q. Any other representative of the Prudential Insurance Company in Mr. Simkins' office when Mr. Jones was present? A. I don't recall whether they were there when Mr. Jones was present, but Mr. Little came in several times.

Q. Was there any representative of the Prudential Insurance Company in Mr. Simkins' office when Mr. Sawyer was there? A. No.

Q. Do you know the occasion of Mr. Sawyer's visit to Mr. Simkins' office? A. Not his first visits, I don't know, I know he came in, but I didn't even relate his coming into the office in regard to this matter.

Q. You did not know it was in connection with this matter? A. No.

Q. Did Mr. Simkins advise you who Mr. Sawyer represented? A. No.

Q. As far as you knew then when Mr. Sawyer came in the office he was a total stranger to the Crites matter? A. Yes, it was my impression when he was in there, and I recently related the two of them in my own mind.

Q. But coming back to the sale of July, 1933, you did not know who Mr. Sawyer was, or who he represented? A. No, or why he came in there.

Q. You did not know of any connection he might have with the farms in regard to the foreclosure cases? A. No, I think I asked Mr. Harlor if that was why he came in at that time.

Q. Did you know of Mr. Jones' connection at the time he came in in 1933? A. In regard to the farms?

Q. Yes. A. I knew that Mr. Jones was trying to buy the farms.

Q. Where did you get that information, from Mr. Simkins? A. I imagine probably conversation, or parts of it, I might have heard.

Q. Was Mr. Simkins in the habit of telling you what fees he received? A. I never knew of any of his fees.

Q. Did he have a private ledger? A. he must have. I never saw it.

Q. You had nothing to do with keeping his records of either receipts or disbursements? A. No.

Q. Mr. Harlor calls my attention to an entry appearing in the book entitled Cause No. 946, on the page August 1st, Home Insurance Company of New York, for loss of barn, farm No. 6, \$2200.00, and then it being crossed off in blue ink, and in red ink thereunder "Payment stopped on check," will you describe that transaction? A. I believe this barn was one that was struck by lightning, but that is not in my handwriting, that is in Mrs. Abernathy's handwriting, because her handwriting goes on over through the next page.

Q. Then you personally know nothing about that transaction? A. This red ink—it seems to me there was something I recall about a barn being struck by lightning.

Q. Can you identify that with this? A. I thought at first I could, but I don't know now. You can see the difference in the handwriting.

Q. Do you know anything about that check? A. No, I know nothing about the check. I never saw the check.

Q. Were you advised by the receivers as to what was done with that check? A. No doubt since it has been crossed off there no doubt I inquired when I tried—

Q. No, the question is were you advised by the receivers as to what was done with that check? A. I must have been told that it did not go through, but I do not recall about it.

Q. You have no particular recollection of that transaction? A. No.

Cross Examination by Mr. Ingalls.

Q. Mrs. Lutz, you testified a while ago about the receivers paying stamp taxes, were you not reimbursed by the Prudential Insurance Company immediately after you had paid out that money for stamp taxes?

Mr. Haffenberg: She did not testify with reference to stamp taxes, it was with reference to stamps.

Q. Stamps on it; weren't you reimbursed for those by the Prudential Insurance Company? A. If there is an entry in the book.

Q. Have you the records, look for July 19th. A. Is that Madison County?

Q. Apparently in all the numbers this is; 932, I have here, apparently that entry was made on all the cases at that time. A. I will see July 19th. It could only be in Madison County though.

Q. 1933? A. I have the disbursement of the check for that, and then on August 1st, by refund, United States Revenue stamp for the deed, I have the cash coming back. No doubt that came from the Prudential, reimbursed by them for that.

Q. Is that in every one of the Madison County cases? A. Every one of them, according to the book.

Q. When did your employment by the receivers cease? A. The last check I received on this book shows April 15th.

Q. Was that the time you prepared the final accounts for the receivers? A. No, I think they were prepared after that, but that was my last check from the Prudential—from the receivership.

Q. You prepared all of these final accounts in the twenty-two cases for the receivers? A. Yes.

Q. How many copies did you prepare? A. An original and three copies.

Q. And you have never seen the original since that time? A. No.

Q. They have not been in your possession? A. No.

Q. Do you know of your own knowledge what was done with these final accounts? A. I came to Columbus, and brought them to Judge Hough's office.

Q. Did you bring them in Judge Hough's office? A. I did not take them into Judge Hough's office, I was in the outside room. I came to Columbus, and they were brought to Columbus.

Q. Did you take the cases back? A. No, they were left there.

Q. What else did you bring with you at the time, if you remember? A. I brought all the books and bank

deposit slips. They were attached, and I thought the check stubs, but those bank deposit slips do not seem to be here.

Q. Did you bring any receipts? A. Yes, I issued receipts, and had them signed, for every check that was issued.

Q. How did you bring the receipts up? A. In a manila envelope.

Q. An envelope of what type? A. They were the heavy red ones.

Q. Heavy red envelope? A. Yes.

Q. You did not take those home with you? A. No.

Q. The last you saw of them they were in the ante-room of Judge Hough? A. I saw them carried into Judge Hough's office from the ante-room, but I did not see them after they passed the door.

Re-direct Examination by Mr. Haffenberg.

Q. When you issued a check to a party, you took a receipt? A. When I issued a check to the telephone company they signed this receipt that I took with me, and any person that I took a check to.

Q. Mrs. Lutz, did you furnish copies of reports to the Prudential Insurance Company from time to time? A. No, the only copy they got was the completed copy at the end.

Q. That is the tabulation of receipts and disbursements? A. Yes.

Q. That was made up from a recap of receipts and disbursements, as you found them? A. Yes.

Q. As to the material contained in there prior to November, 1932, you had no independent knowledge? A. No.

Q. All of the affairs were handled by another person? A. Yes.

Q. And as I understood you to say that other person, Mrs. Abernathy, had never discussed with you any of that information? A. No.

The Master: When you received the records from Mrs. Abernathy were they in these books?

The Witness: I simply went in Mr. Simkins' office and the books were handed to me as they were.

The Master: As I understand, these books were the first you received, and you merely added to them?

The Witness: Yes.

And also:

EDWIN JONES, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Q. State your name and address. A. Edwin Jones, Washington Court House.

Q. Your business? A. Real estate.

Q. That is Edwin S. Jones, is that correct? A. Yes.

Q. You are in the real estate business? A. Yes.

Q. You have been in the real estate business there for how long? A. Eighteen years.

Q. Continuously? A. Yes.

Q. And have a general knowledge of farm lands in and about this section of the country? A. I know something about them.

Q. You have dealt in farm lands? A. Yes.

Q. You have bought for investors, and sold for parties, properties in Pickaway County and Madison County? A. Yes.

Q. And various counties in and through Ohio? A. Central Ohio, yes.

Q. Are you familiar with the properties formerly owned by Henry M. Crites, or H. M. Crites in Madison and Pickaway Counties? A. I knew of the farms.

Q. Some 4000 acres involved in Madison County and a like amount, or more, in Pickaway? A. I knew nothing about the lands in Pickaway, I knew about those in Madison County.

Q. That comprised some eleven farms? A. Four thousand and some acres, I do not know how many.

Q. How long have you been familiar with that farm?

A. About ten years.

Q. Checking on it from time to time? A. No, I wouldn't say I was checking on it.

Q. As you would any other lands around in this section? A. Yes.

Q. You say you are familiar with it for ten years. What occasioned your familiarity? A. I remember when it changed hands, and then Crites traded for it. I remember when Crites sold it, and I kept track of it.

Q. It was your business to watch various properties in and about this section, wasn't it? A. It is.

Q. Coming back, now, to 1933, I believe that you testified that you called on Mr. Crites in reference to the purchase of the Madison County lands, did you not? A. When did I testify to that?

Q. That you called on Mr. Crites in connection with the purchase of the Madison County land? A. I did not testify. I did before this sale came up.

Q. I am getting back to prior to 1933. A. Yes.

Q. A year or more say? A. Yes.

Q. And you made an offer for those lands? A. Yes.

Q. And he turned you down on that offer? A. Yes.

Q. And do you recall the amount of the offer you made for those farms?

Mr. Ingalls: To which we object.

The Master: What is the purpose of this evidence?

Mr. Haffenberg: I will connect it up, if your Honor please, with the receivers' activities in connection with the properties and funds.

Mr. Ingalls: Unless it can be connected up with the receivership, and they have not done that, it will serve no purpose in this hearing.

Mr. Haffenberg: It is preliminary.

Mr. Claypoole: I do not see how it could be coupled up. It is prior to the whole proceeding, as I understand it.

Mr. Haffenberg: I will couple it up.

Mr. Harlor: We will connect it.

The Master: You may proceed, subject to its being later stricken.

Mr. Ingalls: Exception.

(Question read.)

Q. Referring to the Madison County farms. A. It was something like \$500,000.00.

Q. And Mr. Crites then rejected that offer, isn't that correct? A. Yes.

Q. In whose behalf did you make that? A. J. C. Penny.

Q. Who was Mr. Penny representing? A. I do not know, J. C. Penny of New York.

Q. You dropped the negotiations then? A. They would not take the price that he agreed to give, so we dropped it.

Q. When did you next hear about the Madison County farms? A. Well, I read in the paper a long time afterwards where there was action started against Crites, and one of the Prudential agents—I forget who it was down there—at the time talked with me about it, and he said he was in no position to talk about it now, that they did not have the farm, and would not be in any position until they got the farm.

Q. Do you recall whether that was Mr. Simerman or Mr. Little? A. I think it was Mr. Simerman, I won't say positive.

Q. Your contacts were more close with Mr. Simerman, weren't they? A. I knew him. I didn't know Mr. Little at the time.

Q. Now, tell us, when did you next see Mr. Simerman with reference to those farms?

Mr. Harrison: At this time the Prudential Insurance Company objects to this line of questioning on the ground, first, that there is no issue tendered here as to the sale or resale of these farms. The only issue being the correctness or incorrectness of these receivers' reports, and the further matter of the additional fees for which Mr. Ingalls has made application, and upon those grounds we object to any question as to the sale or resale of these farms.

Mr. Haffenberg: I call the Court's attention to an affidavit filed here by Mr. Harrison, to which he attached a copy of the contract. Mr. Harrison, who is counsel for the receiver, has charged this estate, or received fees from this estate. He is likewise counsel for the Prudential Insurance Company. I am satisfied we can connect this all up with the receivers' accounts; but I merely want to call the Court's attention to the affidavit filed by Mr. Harrison.

The Master: I think counsel understands the issues in this hearing, and I do not believe that counsel will willingly go outside or knowingly go outside of the scope of those issues, and you may proceed with the understanding that you confine yourself to those particular issues. In other words, we are not concerned here with matters which are foreclosed by the decree of the Court confirming the sale. We are concerned primarily with the accounts and additional fees, anything which bears on that is pertinent. Anything outside of that I do not think is pertinent.

Mr. Haffenberg: I will reserve my argument until we are through on that score, if your Honor please.

The Master: You may connect it, if you can.

Mr. Haffenberg: I also want to call the Court's attention to the objection filed by the Prudential Insurance Company to the claim of Mr. Ingalls wherein denial is made of the matter set up in Mr. Ingalls' petition, so apparently they thought there was enough in the issue to deny it.

(Question read.)

Q. If I can bring your mind down to about sometime before July 1st, which was the date of the marshal's sale, was it a matter of a couple of months or a couple of weeks before the marshal's sale that you saw Mr. Simerman, or had you been seeing him from time to time after you read the article in the paper? A. He was in our territory, he came through our town once in a while.

Q. And he dropped in and talked? A. Yes, but not particularly as to this farm.

Q. Was the Madison County properties a matter of discussion between you? A. He said he was in no position to sell the farms.

Q. Did Mr. Simerman refer you to Mr. Simkins? A. He did not.

Q. Did Mr. Simerman tell you that Mr. Simkins was one of the receivers in charge of it? A. He told me that Mr. Simkins was one of the attorneys in the case.

Q. Did he tell you that Mr. Simkins was one of the attorneys for the Prudential Insurance Company? A. I don't remember who that he told me he was attorney for. He said he was one of the attorneys.

Q. Did he tell you anything about Mr. Florence? A. No.

Q. Did you have some discussions with Mr. Little of the Prudential Insurance Company? A. I do not believe at that time we did.

Q. Did you have any talk with Mr. Harrison prior to the marshal's sale? A. No.

Q. Do you know who Mr. Harrison is? A. I think that is Mr. Harrison.

Q. That is right. A. I don't think I had any talk with Mr. Harrison.

Q. Did you meet Mr. Harrison at the Neil House at Columbus, Ohio, prior to the marshal's sale? A. I met Mr. Simerman and some other men, I don't know who they were.

Q. Were those men representing the Prudential Insurance Company? A. Vance Simerman was.

Q. You told Mr. Simerman you were interested in the Madison County farms? A. I told him that several weeks before that.

Q. You were negotiating with him? A. He said he would not enter into anything until they acquired it.

Q. Did he tell you how much of a mortgage they had against them? A. Approximately.

Q. Tell you how much you might be able to buy the farms for at any time? A. He didn't know until they acquired them.

Q. Did he tell you how much he would be able to sell the farms to you for in the event they acquired them? A. I don't think that he did.

Q. You had negotiations along that line? A. Yes.

Q. Were those negotiations with Mr. Little as well?

A. I don't think Mr. Little was in on it. Maybe he was. I don't think so.

Q. Was any representative other than those two of the Prudential Insurance Company that were in those conferences in reference to the negotiations of the Madison County farms? A. Three of us met one night, but I do not know who the other was.

Q. Where did you meet? A. The Neil House.

Q. Was that before or after the marshal's sale? A. I think it was before the sale.

Q. Did you have any discussion with them with reference to entering into a contract with you? A. I did at that time, but they would not do it. They said that they would not do anything until they acquired it.

Q. Did they discuss the terms of what the contract might be for those properties? A. Well, they told me approximately what they had in the loan.

Q. Did they correspond with you? A. No correspondence that I know of.

Q. Did they correspond with anybody representing you? A. Not that I know of.

Q. Did you correspond with anybody representing the Prudential Insurance Company? A. No, sir.

Q. Did Mr. Sawyer correspond with the Prudential Insurance Company? A. I couldn't answer that.

Q. Did Mr. Proctor correspond with the Prudential Insurance Company? A. I couldn't answer that.

Q. When did you first meet Mr. Simkins? A. Well, I went over to see him a few days before the sale, I went to see him. He did not come to see me. I went to see Mr. Simkins and I told him—you want to know what I told him?

Q. No. Was that the first time you ever met Mr. Simkins? A. No, sir, I had known him a long time.

Q. How long? A. Fifteen or twenty years.

Q. You know him rather intimately? A. I know him just in a business way, is how.

Q. Have you had any other business dealings with Mr. Simkins? A. Yes, sir.

Q. When? A. Before the sale.

Q. How long ago? A. The first time about twelve or fourteen years ago.

Q. When next? A. I cannot remember just offhand.

Q. Tell us of the first conversation you had with Mr. Simkins after telling us when and where. A. When and where? You mean prior to this sale?

Q. The first conversation you had with him relative to any of the Crites properties. A. I went to see him and told him that he was one of the attorneys in the matter, and I was interested in trying to buy it, and he told me "we are in no position to offer it right now, not in position until after the foreclosure proceedings, and the Prudential Insurance Company acquires title for it, then they would be in position to offer it to anybody else trying to buy it". I told him that I would like for him to intercede for me if he would, and it was at my suggestion that I told him that, and he said he would do what he could for me, so that was about the end of that.

Q. Where was that conversation? A. In his office.

Q. When? A. I would say four or five weeks before July 1st.

Q. Who else was present? A. Just him and I.

Q. Do you recall telling him whom you represented? A. I didn't tell him whom I represented.

Q. Mr. Jones, did you have any subsequent conversation with him? A. No, sir.

Q. Did you talk to him about any compensation to be paid him for representing you?

Mr. Claypoole: We object.

Mr. Haffenberg: I take it this goes in subject to objection.

The Master: What is your objection?

Mr. Claypoole: I think it is immaterial, but if it goes in subject to later ruling of the Court, it is all right. We just want our exception.

(Question read.)

The Master: Make that question more definite.

Q. Representing you in connection with the purchase of the Madison County farms that were in foreclosure.

Mr. Ingalls: I am objecting at this time, because it is not tied up with the receivership proceedings in any way.

The Master: You may answer.

The Witness: Yes, sir.

Q. Did you enter into any contract or written agreement with him with reference to that arrangement between you and him? A. Some kind of a contract, but I have not a copy of it, or do not remember anything about it.

Q. Did he draft the contract for you? A. I think I helped draft it.

Q. You both sat down together and wrote it out, is that right? A. Yes.

Q. Did you sign one of those copies? A. I know that I signed it. I don't know whether he did or not.

Q. You left one copy with him, left the signed copy with him? A. Yes.

Q. And he let you have a copy for yourself? A. Two copies made.

Q. Was that typewritten? A. I can't remember whether it was or not.

Q. Was that all done in his office? A. Yes.

Q. In Circleville? A. Yes.

Q. Do you know whether anybody else was present at that time? A. No, nobody else present. It was at my suggestion, and I suggested that I give him something.

Q. Do you know what the terms of that contract were? A. I don't know.

Q. Do you know what you were to pay him? A. I don't remember.

Q. Do you know what he was to be paid for? A. Well, for his services in helping me.

Q. Helping you in what respect? A. Helping me in getting this farm, acquiring the farm, and any other services in the way of legal work.

Q. Was your arrangement with him conditioned upon your securing the farms as to whether you paid him anything or not? A. Yes, sir.

Q. If you did not secure these Madison County farms were you obligated to pay him anything? A. No.

Q. Mr. Jones, did you pay Mr. Simkins anything in connection with the services rendered in the acquiring of the Madison County farms? A. I never gave him any money or my check.

Q. Did anybody else on your instructions pay him for those services? A. Yes.

Q. Who? A. My father.

Mr. Claypoole: I take it this is all going in subject to objection.

The Master: All subject to your objection, and to be later determined.

Q. I am showing you what has been marked for the purposes of identification as Exhibit No. 5, June 11th, 1935, a check No. 432, dated Washington, C. H. Ohio, July 29th, 1933, payable to the order of Richard Simkins, \$1,297.00, signed Jones and Jones, and endorsed by Richard Simkins; can you state whether or not that was the check that was paid Mr. Simkins for his services to you in connection with the purchase of the Madison County farm? A. I can say that is my writing and my father's signature.

Q. Is that payment to Mr. Simkins? A. I don't know whether Mr. Simkins got the money, or whose endorsement.

Q. Can you state for what purpose that check was delivered to him? A. I stated it a while ago.

Q. State it again. A. For services in reference to the Houston farm.

Q. That is known as this Madison County farm containing some 4800 acres? A. Yes, sir.

Q. Those are the farms you ultimately acquired for whomever you represented from the Prudential Insurance Company? A. Yes.

Q. Isn't that correct? A. Yes.

Mr. Haffenberg: I show this check to the Court, and will ask that it be impounded as one of the exhibits in this case.

And thereupon the check heretofore marked as Exhibit No. 5 was handed to the Court to be impounded, and herewith submitted.

Q. That check bears the endorsement of the First National Bank of Circleville, cleared through the Ohio National Bank of Columbus, Ohio, on August 21st, 1935, and paid by the Washington Court House Bank on August 22nd, 1933; have you made any effort to locate that contract between you and Mr. Simkins? A. Yes.

Q. Did Mr. Simkins know whom you represented in the purchase of that property? A. He did not at that time, no, sir.

Q. When you say "at that time", do you recall your testimony in a case at Circleville? A. I remember being over there to testify.

Q. Do you recall testifying in that case that you did not tell Mr. Simkins in the first part whom you represented, but later on told him? A. I did. It was about the time of this sale that I told him.

Q. Can you state how long before the sale? A. I don't know.

Q. Can you state how long after the confirmation? A. No, I can't.

Q. Do you recall testifying that he wanted to know how much your buyer would pay for it? A. I don't remember that, no, sir.

Q. Do you recall testifying that you told him that your buyer would pay \$286,000.00 for that land? A. No, sir, I don't remember it.

Q. Do you remember stating to Haffenberg today that after you had so testified you found you were in error about that amount? A. I think I told you today that was wrong. If I testified to that I told you that was wrong.

Q. You recall having testified that you told him, meaning Mr. Simkins, what your buyer was willing to pay for that property? A. I don't remember testifying to that.

Q. You recall having testified that you later told him who the buyer was that you represented in purchasing that property? A. I think I told him—it was about the time of the sale when I told him that.

Q. Simkins knew that you did not have any \$286,000.00 of your own money? A. Yes.

Q. That question was raised with you by Simerman and Little, and Simkins, as to how good the buyer was?

A. I don't remember whether they raised it or not. I just told them the man had the money, was all.

Q. Do you remember being in Mr. Simkins' office prior to the marshal's sale with a contract? A. With a contract, what for?

Q. Regarding the purchase of the Crites property, the Madison County farms. A. The only contract I had existed between myself and the Prudential, and I think they have a copy, as the original existed.

Q. What brought about the drawing up of that contract, Mr. Jones? A. I think it was a contract drawn if they acquired it, I think that is the way it was, they wouldn't guarantee nothing until they acquired it.

Q. How did you happen to draw up that contract? A. I wanted to buy it, that was all.

Q. Wasn't that the result of negotiations you had with Simerman and Little? A. Well, I don't know whether it was the result or not.

Q. Where did you get at the terms in connection with the purchase of the property that was contained in that contract? A. Where did I get the terms?

Q. Yes. A. It was terms I was willing to give.

Q. That was the price you were willing to offer? A. Yes.

Q. Anything said about good faith money being deposited by you? A. I don't remember that.

Q. Do you recall whether Mr. Simkins drew up any such contract for you? A. I don't remember.

Q. Did Mr. Sawyer of Cincinnati draw up any such contract? A. Mr. Sawyer was never present at any time.

Q. Do you know of any attorneys that drew up the contract for you? A. No, I do not.

Q. Did you have this contract with you at the Neil House? A. Not at that time, no.

Q. Did you discuss with the Prudential men the terms of the purchase of this property so as to incorporate it in that contract? A. Just talked about the price. I do not think the contract was talked about at that meeting.

Q. Do you know where your copy of that contract is? A. I do not.

Q. Do you know what you did with it last? A. No.

Q. Did you send it to Mr. Sawyer? A. No.

Q. Did you send it to Mr. Proctor? A. I couldn't say that I did not, I might.

Q. Did you receive any communication from the Prudential Insurance Company with reference to that contract?

A. Receive what?

Q. Any communication from them? A. It has been so long I forget about it.

Q. When did you first learn whether or not they accepted your contract? A. I think it was the day before the sale.

Q. Did they give you a signed copy? A. I think I have a signed copy, I would not be positive about it.

Q. Did you meet Mr. Woodruff of the Prudential Insurance Company? A. I don't think I did.

Q. Did you ever meet Mr. Worthington of the Prudential Insurance Company? A. No, sir.

Q. Do you know who delivered to you the signed copy?

A. No, I don't remember.

Q. Showing you Exhibit 4, and the exhibit purporting to be Exhibit A, a copy of a contract dated at Circleville, Ohio, June 27th, 1933, addressed to the Prudential Insurance Company, can you state whether or not that in substance is the contract that you signed? A. I think that is something like it, but I don't know whether that is the contract or not.

Q. Do you recall having produced a contract for the purpose of having your signature witnessed by Mr. Simkins and the lady in his office, Mrs. Lutz? A. Do I recall what?

Q. Having produced a contract in Mr. Simkins' office for the purpose of having him witness your signature?

A. This would be the only contract, if there was any.

Q. Does that refresh your recollection, as to who prepared that contract for you, Mr. Jones? A. I don't remember who prepared that.

Q. Do you know whether that was prepared by the Prudential Insurance Company? A. I do not believe it was, no, sir.

Q. Do you know where you got that contract? A. I don't remember where I got it, I wouldn't say positive.

Q. Did you bring it to Mr. Simkins' office? A. I don't know where I got it, I don't remember that.

Q. Was it in Mr. Simkins' office at the time you went there and had him attest your signature? A. I can't answer.

Q. Can you tell the Court more about where that contract originated from? A. I don't remember who wrote it. That was my own proposition to do that.

Q. Is that the same proposition that you outlined to any representative of the Prudential Insurance Company before that contract was signed or drawn up? A. That is exactly what I agreed to.

Q. That was what you agreed to, and this contract was written up in accordance with your understanding? A. I think that is right.

Q. And it was then submitted to you, is that right? A. Yes.

Q. And you were satisfied with it, and signed it? A. Yes.

Q. Did you make out a check? A. Yes.

Q. For how much? A. \$3000.00, it says here. I forget how much it was.

Q. Was that your own check? A. Yes, sir.

Q. What did you do with that check and contract? A. I gave him a check, somebody a check, I do not know who I gave it to, the check was to the Prudential Insurance Company.

Q. To the Prudential Insurance Company? A. Yes, a certified check.

Q. Whose check was it? A. My check.

Q. Did you look for that check in response to this subpoena? A. Yes.

Q. Were you able to find it? A. No, sir.

Q. Did you get a receipt for the check? A. No, the check would show.

Q. After you signed this contract you delivered it to somebody, didn't you? A. Delivered what?

Q. The contract. A. I don't remember whether I did or not.

Q. Was that contract any good without the acceptance on the part of the Prudential Insurance Company so far as you were concerned? A. You say so far as I was concerned, no.

Q. Whom did you deliver that to? A. Deliver what?

Q. That contract? A. I don't know, I think I gave it to Mr. Proctor. I don't know.

Q. Did Mr. Proctor send it to the Prudential? A. This contract?

Q. Yes. A. I don't know.

Q. Was it signed by the Prudential Insurance Company, before you signed it? A. No, I signed it, and it was to be sent then for acceptance, I remember that.

Q. Was it to be sent to them for acceptance with this \$3000.00 check? A. I think that is right.

Q. To whom did you give the contract and the check, to transmit to the Prudential Insurance Company for their acceptance? A. I don't remember.

Q. Was it Mr. Simkins? A. I couldn't say it was.

Q. Was it Mr. Simerman? A. I don't know which one it was.

Q. Was it either one of those two gentlemen? A. I wouldn't say who it was, I mailed it to them myself.

Q. Did you mail it to them? A. I might have, I won't say positive.

Q. Did you get a receipt for the check? A. No, sir.

Q. That was a certified check, was it not? A. Yes, sir.

Q. Why did you get it certified? A. To show it was good.

Q. Was there anything in the terms of the contract that called for your check being certified? A. Not that I remember of.

Q. Was it Mr. Proctor's check or your check, for \$3000.00? A. My check.

Q. When did you first advise Mr. Proctor that the Prudential had accepted your deal with them? A. Just as soon as this sale was over and they acquired title to it, I told him it was accepted when the sale was over.

Q. You had been over these grounds with Colonel Proctor before the sale? A. I was not over it, but up that way, and he went on it.

Q. You went on the road by the side of them, I take it, to sort of check them over, is that right? A. Yes.

Q. Who was with you? A. Mr. Boyd, Mr. Matthews, and Mr. and Mrs. Proctor, and Miss Mary Johnson, and some fellow here from Columbus.

Q. How long was this before the sale, the marshal's sale? A. A few days before, I don't know how many days before.

Q. Was it a matter of one trip or more than one trip? A. He only made one trip.

Q. Any representatives of Mr. Proctor inspect the property otherwise with you? A. Mr. Matthews and Mr. Boyd.

Q. Did Mr. Proctor know that you were dealing with Mr. Simkins? A. I don't know that he did, no, not at that time.

Q. Did Mr. Sawyer know that you were dealing with Mr. Simkins? A. No.

Q. Who gave Mr. Sawyer Mr. Simkins' name? A. I don't know. I might have done it, but I don't remember about it.

Q. Did Mr. Proctor inquire as to how you were going to buy this property? A. No, he did not inquire into it, just told me to buy it.

Q. Didn't you tell him it was involved in receivership? A. I did, sir.

Q. Did you tell him that Mr. Crites was involved in bankruptcy troubles? A. I told him it was in receivership. I explained that to him. I don't know whether as to Mr. Crites or not.

Q. Did you tell him who Mr. Simkins was? A. I did not tell him who he was, no, sir.

Q. Can you tell the Court how you arrived at this figure of \$1,297.00? A. I don't remember how I arrived at that in my own mind. There were some expenses there, some telephoning that Dick had done for me.

Q. Did you ever receive a bill from him for this \$1,297.00? A. No, sir.

Q. Did you get a receipt in full when you paid him the \$1,297.00? A. He never gave me no receipt, no, sir. It was my suggestion that I give it to him. I told him it was worth it, and I gave it to him. He did not ask me for it.

Q. What about this contract between you and him? A. It was my suggestion that we draw it.

Q. If I understand you correctly, that in the event you did not acquire the property you would not be obligated to pay him anything? A. That is right.

Q. When did you last search for that contract? A. Before I came up here, about an hour and a half ago.

Q. Have you ever destroyed it? A. No, I didn't destroy it. It is around some place.

Q. What was there in that contract? A. I don't remember that.

Q. Anything in addition to what you have told us before? A. No, sir, I don't remember what was in it.

Q. You do know that it pertained to the Madison County farms, is that correct? A. Yes, I knew that.

Q. Were you going to buy any of the other farms that were involved in the foreclosure? A. No, sir.

Q. Coming back to this meeting at the Neil House, did you send for Mr. Simkins to be present there? A. I think I asked him and Mr. Simerman both to be there, it was my suggestion.

Q. And you met them both? A. Yes.

Q. Mr. Simkins was then receiver? A. I don't know whether he was or not.

Q. Mr. Simkins was representing you? A. Well, I wouldn't say he represented me.

Q. Was he representing the Prudential?

Mr. Claypoole: We object to that. That would be a conclusion of the witness.

Mr. Haffenberg: If he knows, he can testify.

The Witness: I don't know.

Q. Whom was Mr. Simerman representing? A. The Prudential, I imagine.

The Master: Do you know?

The Witness: I don't know, no, sir.

Q. Whom was Mr. Simerman employed by? A. I don't know. I never saw his pay check.

Mr. Harrison: To simplify that we will stipulate that Mr. Vance Simerman, S-i-m-e-r-m-a-n, was employed by the Prudential Insurance Company.

Q. Did you meet Mr. Harrison at that meeting at the Neil House? A. I don't remember meeting Mr. Harrison.

Q. What was the purpose of that meeting? A. I told him I was trying to buy the farm if they acquired it.

Q. Was this contract that was shown you drawn up after that conference? A. Yes.

Q. Bringing you down to the date of the sale by the marshal to the Prudential Insurance Company here, where were you first advised that the Prudential Insurance Company had acquired the property in the foreclosure proceeding? A. I was there when they were bid off by the Insurance Company.

Q. You mean at the marshal's sale? A. Yes.

Q. Was Mr. Harrison there at the time? A. I don't know whether he was or not.

Q. Was Mr. Simerman there at the time? A. Yes.

Q. Tell us what took place after that? A. Didn't anything take place that day.

Q. Did you have any talk with them when you knew that they had bid it in? A. That is what the marshal said—I forget his name—he said the Prudential Insurance Company had bid it in, that is all.

Q. Didn't you talk with the Prudential Insurance man there? A. No.

Q. When did you next hear from him? A. The following week. The sale was on Saturday, if I remember right.

Q. Whom did you hear from? A. I think it was Mr. Simerman.

Q. By telephone? A. Yes.

Q. What did he say to you? A. I can't remember all that detail. He just told me he acquired the farm, and would go through with the deal. That is all I remember.

Q. Didn't he ask you if you were ready? A. I don't remember whether he did or not.

Q. Didn't he state the date of closing? A. I told him when he got the title ready I thought may be we would close it.

Q. Did you hear from Mr. Simkins following the sale? A. I think I heard from him, yes.

Q. Didn't they tell you that after the marshal's sale they would have to get these sales confirmed by the Court?

A. I knew they had to get them confirmed, I knew that.

Q. You would have to wait until after the confirmation, is that right? A. Yes.

Q. Had you talked that over with the Prudential Insurance people? A. I don't know whether I did or not. I knew that much about it.

Q. How soon after the confirmation of the sale, which I understand took place on the 18th of July, did you hear from any representative of the Prudential Insurance Company? A. I would say four or five days.

Q. Whom did you hear from? A. I don't remember.

Q. By telephone? A. I don't remember.

Q. Didn't they set a time for the closing of the transaction? A. I set a time.

Q. Where was this time set, and when? A. Cincinnati.

Q. Whom did you talk to? A. I don't remember whom I talked to.

Q. How did you notify the Prudential about closing up at Cincinnati? A. I talked with one of their men, and told them to meet me down there.

Q. Did you tell them to bring the \$3000.00 check with them? A. I don't know.

Q. You had given them a check for \$3000.00 before that? A. Yes.

Q. Certified check? A. Yes.

Q. That was all a part of the purchase price? A. Yes.

Q. Did you meet them at Cincinnati? A. Yes.

Q. Did you notify Simkins that you were ready to close up with the Prudential? A. Yes.

Q. Who all were at Cincinnati? A. Mr. Simkins, Mr. Little, and Mr. Simerman, and my father, and I.

Q. Mr. Harrison? A. I can't remember whether Mr. Harrison was there or not.

Q. Who delivered the deeds there? A. Mr. Little.

Q. And where did you meet in Cincinnati? A. Met up town and went out to Truxton H. Emerson's.

Q. Do you spell that T-r-u-x-t-o-n? A. T-r-u-x-t-u-m.

Q. What time of the day? A. I don't know what time it was.

Q. What did the Prudential representative have with him? A. He had a deed made to Truxton H. Emerson

and they wanted it changed and made to Mary Johnson and there were some other legal matters, and Dinsmore, Shohl and Sawyer were their attorneys, and Mr. Dinsmore the son, was there, and they adjourned later on.

Q. Was anybody representing the Prudential there in a legal capacity? A. I can't remember who was there in a legal capacity, no, sir.

Q. Did you have your checks for the balance of the purchase price? A. I did not.

Q. Did you obtain your checks for the balance of the purchase price? A. No, sir, I never had the checks.

Q. Did they deliver the deeds without the checks being paid to them? A. They had the deeds ready, but did not deliver them until the money was paid.

Q. Were you there when the money was turned over? A. They did not turn it over that day.

Q. Were they ready to turn it over? A. No, the title was not to suit them yet.

Q. Who raised that objection? A. Mr. Dinsmore.

Q. An attorney of Cincinnati? A. Yes, sir.

Q. To whom did he raise that objection? A. To Mr. Little.

Q. What did he say? A. I don't remember what it was, I was not interested in that part of it.

Q. He wanted the deed corrected? A. Something. I don't know what it was.

Q. They did not close it up that day, is that correct? A. Yes.

Q. When did they close it up, the following day? A. No, sir. I don't remember how many days after that, I don't remember.

Q. Then did they meet again in Cincinnati? A. Yes.

Q. Who was present at this next meeting? A. I don't remember.

Q. Mr. Little? A. I can't remember.

Q. There was something outstanding about that situation, was there not? A. I did not handle the money from then on. Mr. Proctor gave his own check for it.

Q. Did you see him turn over the check? A. No, sir, I don't think he did, I think Mr. Sawyer,—I am not sure about that.

Q. Do you know what the amount was that the Proctor check was issued for? A. I do not.

Q. Do you know whether it was for the amount as called for in this contract shown on the exhibit before you? A. I couldn't answer that.

Q. How many checks did Mr. Proctor make out in connection with the purchase of that property? A. I don't know, two that I know of.

Q. How much were they, and to whom? A. I don't remember the amounts.

Q. Approximately? A. I don't remember the amounts of them.

Q. Were any checks made out to you by Mr. Proctor? A. Yes, sir.

Q. And for how much? A. I don't remember, I think it was \$15,000.00, one of them, I don't remember what the other was.

Q. The other was \$10,000.00? A. I don't remember.

Q. Approximately \$10,000.00? A. I don't know.

Q. Would you say it was less than \$10,000.00? A. I say I don't know.

Q. Was any portion of those two checks that you paid out to anybody else? A. No, sir.

Q. You kept all that for yourself? A. Yes, sir.

Q. Where did this \$1,297.00 come from? A. In indirectly came from this money.

Q. Came out of this money that was given to you by Mr. Proctor? A. Yes.

Q. Was Mr. Simkins there at that time? A. What time?

Q. The second meeting when you closed up the transaction? A. I don't know whether he was or not.

Q. Were you there? A. I don't think I was there, when that deed was delivered that day. I don't think I was there myself.

Q. Whom did Mr. Dinsmore represent? A. Dinsmore, Shohl, and Sawyer represented Colonel Proctor.

Q. Did they pass on the title? A. I think they did.

Q. Will you make an effort, Mr. Jones, to locate that contract between you and Mr. Simkins with reference to compensation? A. Yes, sir.

Q. And any correspondence with reference to the delivery to you of this contract marked Exhibit A that is before you, any correspondence with Sawyer, or Dinsmore, or Proctor with reference to the farms? A. I will, yes.

Q. Any correspondence with Simkins? A. Yes.

Q. Any correspondence with the Prudential Insurance Company? A. Yes.

Q. And bring those with you? A. Yes.

Q. And we will ask that his subpoena be continued. You are not contemplating going out of town shortly now, are you? A. Now?

Q. Within a short time? A. I want to get away as soon as I can.

Q. To go where? A. To go home.

Q. I meant so far as going away now on a trip. A. No.

Q. We can get you by telephone? A. Yes.

The Master: Anything by anyone else?

Mr. Ingalls: I would like to ask one question.

Q. (By Mr. Ingalls) Did you make any effort to buy the Madison County farms at a private sale? A. Before this?

Q. Yes. A. Yes.

Q. From the Prudential Insurance Company? A. From Mr. Crites.

Q. Did you, from the Prudential Insurance Company, prior to the sale, make an effort to buy it at private sale? A. I did, and they said they would not do anything until they acquired it.

The Master: The Master is going to ask one question here. If you think it wrong and improper you may except to it in the record.

Q. (By the Master) Were you authorized by your prospective purchaser to bid on any part of this real estate except as an entirety or to buy any part of it except as an entirety? A. I was not authorized to buy any of it, only the Madison County land of 4844 acres as a whole.

Q. You were not authorized to buy one or more farms except as a whole? A. No.

Q. (By Mr. Haffenberg) Had you made that known to Mr. Simkins and the Prudential Insurance Company, that you were only interested in buying the 4800 acres as a unit? A. I did not, no, sir. I never talked that way. I told him I was interested in buying, but didn't say it just that way.

Q. Why didn't you buy less than the 4800 acres? A. That was all to be bought all together.

Q. You wanted the entire tract as a whole? A. Mr. Proctor did.

Q. Did you tell Mr. Simkins or the Prudential Insurance Company that your party wanted to buy the tract as a whole? A. Never talked to him about that.

Mr. Claypoole: One question that I think is in line with your Court's question. Did not Colonel Proctor insist on a general warranty deed from the Prudential Insurance Company? A. That is correct.

Q. (By Mr. Haffenberg) Anything said about a guarantee policy? A. No, sir, he said a general warranty deed from the Prudential Insurance Company was good enough for him.

Mr. Haffenberg: We will ask that you leave the check here.

Mr. Jones, Sr.: The check is mine.

Mr. Haffenberg: May we have that?

Mr. Jones: Leave it with the Court.

Mr. Haffenberg: Let it be impounded with the Court.

DAVIS HARRISON, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Q. State your name and address. A. Davis Harrison, Indianapolis, Indiana.

Q. You are counsel for the Prudential Life Insurance Company? A. I am retained by them in different matters, I am not counsel in the sense of being employed.

Q. I have reference to the pending foreclosure suits.
A. Yes, I am, that is right.

Q. You also represent them in other matters, I take it? A. That is right.

Q. You were in court during the testimony and statements made by Mr. Simkins? A. You mean at the previous hearing last week?

Q. Yes. A. Yes, sir.

Q. Were there any statements made by Mr. Simkins that to your knowledge were incorrect? A. Yes.

Q. State what they were. A. The statement that he did not give me any money or fees. I reminded him of that immediately after the hearing, and he was still of the opinion that he did not, but his statement was incorrect.

Q. Did you receive fees from him? A. I did.

Q. When, and how much? A. I received a total of \$1000.00 in the fall of 1933. That was in three installments. I am assuming, your Honor, that this is all subject to objection on the question of whether or not it is competent. The first of these installments was about the first of August, that was, about the 29th or 30th of July, and then I think there was one in August, and one in October, making up a total of \$1000.00.

The Master: For the purpose of keeping the record straight, your assumption is correct, it is being admitted subject to objection later.

Q. Were these checks sent to you? A. I think one was, and I think at least one was given to me in person, on the occasion of some visit to Ohio.

Q. Was there any correspondence between you and Mr. Simkins in connection with the fees or checks paid you? A. I think there was, I think two or three letters, I think one of them I acknowledged a check for \$200.00.

Q. Have you the letter from him accompanying that check to you? A. No. I think all I have is my acknowledgment.

Q. Did he tell you what that check was for? A. Not in the letter.

Q. What was it for? A. Mr. Simkins and I had a conversation. I think two or three conversations, in fact,

in which Mr. Simkins stated to me—these were during the summer of 1933—that he thought that out of the sale of these farms, different ones, after they were acquired by the Prudential Life Insurance Company, he would realize something like \$3000.00, and I do not know, I mentioned the subject of his giving part of it to me, but it was discussed, and there was no agreement as to the amount or anything of that sort, we talked generally the fact that I had sent a good deal of business to Mr. Simkins, and that I had handled some business for him in Indiana for which I had never been paid, and the statement was made by him that this was a lump sum that would be coming in, and he would let me have some. Then when the first payment of \$500.00 was made he said to me that during the fall as he got in other fees he would pay similar amounts.

Q. Do you recall the date of the first payment to you? A. I just testified it was about the last of July, it might have been the first day of August, was in the last two or three days of July.

Q. Was it at your suggestion that Mr. Simkins was appointed co-receiver of these other properties? A. Yes, it was.

Q. You likewise acted as associate counsel in the filing of the bills for foreclosure as well as associate counsel for Mr. Florence and Mr. Simkins as receivers appointed under those bills? A. Yes, I prepared bills of complaint and brought them out here and the name of Mr. Ingalls, or rather the firm of Ingalls and Selby, that signature was added to the bills, and they were filed in the United States Court, and I also acted as co-counsel for the receivers under the appointment of Judge Hough.

Q. The name of Ingalls and Selby's firm was referred or recommended to you, or suggested to you by Mr. Simkins? A. Yes, it was. I had met "Cap" Ingalls before that, as I recall, on a trip once from New York that I had met him, but as far as the employment in this case, I am satisfied it was suggested by Mr. Simkins.

Q. Was there anything else in Mr. Simkins' testimony or statement in court here about June 2nd that you wish to correct? A. I do not think of anything, I have not read or seen the testimony.

Q. You heard all the statements? A. Yes.

Q. You were rather attentive to all that went on that day? A. Yes, I think I was. If you have the transcript, and want to direct my attention to anything—

Q. Were you present at this meeting in the Neil House in Columbus at which Mr. Simkins and Mr. Jones, and Mr. Simerman were there? A. I was present at a meeting at the Neil House, but my recollection of that meeting was this—

Q. Supposing you tell us first when that meeting took place. A. I cannot tell you, I do not know.

Q. Can you tell us who was present? A. I think Mr. Simerman, I think Mr. Little was present. He is the Farm Loan Manager of the Indiana branch, that is of the Prudential Life Insurance Company, and Vance Simerman, connected with the office, I think in the position of property manager, I think Mr. Simkins was present, I think Colonel Florence was present, my recollection is the only thing that was discussed there was some matter relating to some machinery or equipment, that is that there was a controversy between somebody who had purchased one of the Pickaway County farms—may I ask Colonel Florence, was it my understanding that there was some controversy about—

Q. Was Colonel Florence there at this meeting? A. Yes, I think he was there—about somebody who was objecting to some crops or something?

Q. May be you are talking about another meeting. A. That is the only meeting I recall at the Neil House.

Q. Was Mr. Jones there? A. I do not think he was, because it was not in connection with the Madison County farms, as I remember.

Q. Weren't you present when Mr. Little and Mr. Simerman were there on behalf of the Prudential Life Insurance Company and yourself on behalf of the Prudential Life Insurance Company, and Mr. Jones, and Mr. Simkins were there? A. I may have been, but I do not know that I was at that particular meeting.

Q. Do you recall the meeting at which Mr. Jones occupied one room or suite of rooms, and Mr. Simerman occupied another, Mr. Simkins going from one room to

another in connection with the property involved in this foreclosure? A. No, when I heard that about Mr. Jones occupying one room and Mr. Simerman another, that does not mean anything to me, I may have been there, but I do not remember anything about it.

Q. Did Mr. Simerman report to you and suggest the meeting? A. No, I know Mr. Simerman did meet with Mr. Jones and Mr. Simkins.

Q. What is Mr. Simerman's authority in connection with the Prudential Life Insurance Company? A. I say he is, I think, called the property manager, that is he has charge of the sales after properties are acquired.

Q. Was it Mr. Simerman or Mr. Little, to your knowledge, that was met by Mr. Harlor and Mr. Haffenberg in a deal to get the Prudential Life Insurance Company to meet us on the Crites company on account of that deficiency, do you recall such a bill? A. I think Mr. Little and I met with you and Mr. Harlor, that is my recollection, I remember that subject being discussed.

Q. Do you remember bringing us into some office of the Prudential Life Insurance Company. Now, can you recall whether that was Mr. Little's office, bringing us to the man who was in charge of the matter. A. In Indianapolis?

Q. Yes. A. It was Mr. Little's office. That is where it would have been, I do not remember distinctly, but he is in charge of the Indianapolis office.

Q. Is Mr. Simerman under him? A. Yes.

Q. Mr. Little was acquainted with the fact that Crites, Incorporated, which was the reorganization of the affairs of H. M. Crites, supervised by creditors, was attempting to work out the affairs of Crites, for the benefit of the creditors? A. I am going to object to anything going in to the confidential communications between attorney and employer.

Q. All right. Mr. Little is the man in authority in Indianapolis at the office of the Prudential Life Insurance Company? A. That is correct.

Q. Was there any other representative of the Prudential Life Insurance Company that had anything to do with this transaction? A. Not as far as I know.

Q. Mr. Little had also met Mr. Simkins? A. Yes.

Q. He had met Mr. Jones? A. Yes.

Q. You knew that to be a fact at the time, isn't that right? A. I don't know what time you are talking about.

Q. At the time they met him. A. I don't know when they met him, I don't know that I was there, I know they met him, but I don't know when that took place.

Q. Did Mr. Little report to you the results of the conferences with Mr. Jones and Mr. Simkins? A. I am objecting to anything that I learned in a confidential communication with my employer.

The Master: Read the question.

(Question read.)

Q. You are counsel for the receiver? A. That was not a receivership matter, that was a matter of the sale, I was counsel for the Prudential Life Insurance Company.

Q. Then you occupied a dual capacity in that respect? A. Yes, which was known to the Court.

Q. Did Mr. Little produce this contract marked Exhibit A attached to your affidavit? A. I got it from the branch office, I do not know whether he personally did, I would imagine that he did, at least, it was not in my office, I got it from the Prudential Life Insurance Company.

Q. You had nothing to do with the drafting of that contract? A. No.

Q. Did you see it before it was signed by Mr. Jones? A. No, sir.

Q. When did you first learn of that contract? A. I am objecting again to anything communicated to me by my client.

Q. How can he? He has already waived that privilege by filing it in court. That is a document that is filed in this court, and I have a right to ask him when he first saw it.

The Master: I think counsel is correct, the privilege has been waived, but as to general communications between you and the Prudential Life Insurance Company I think you have a right to refuse to answer.

Q. Referring to Exhibit A attached to your affidavit. A. I knew about it at the time of the sale, that a written offer had been submitted, as to its form or as to seeing its contents I do not know, in fact, I would say I did not know its contents until after it was accepted at Newark, that is the main office of the Prudential Life Insurance Company, on July 3rd.

Q. Was the contract submitted to you before it was accepted by the Prudential Life Insurance Company? A. I think not, I think that was sent, I know it was sent to the home office, and my impression, which is just hearsay, is that it was passed on by the legal department there.

Q. Was it sent to you, or rather was it submitted to you before it was signed by the Prudential Life Insurance Company? A. That was signed at the Newark office, those men are at Newark.

Q. My first question was whether it was submitted to you before it was signed by Mr. Jones. You have answered that. Was it submitted to you before it was signed by the Prudential Life Insurance Company? A. I think the same objection goes here to transactions between the Prudential Life Insurance Company and the witness as to those matters. The answer wouldn't do you any good, because it would be that I do not know.

Q. You do not know. Did Mr. Little tell you about these negotiations? A. I object to that.

Q. Did Mr. Little tell you about these negotiations with Mr. Jones that were going to be reduced to writing?

A. I object to that on the ground of privilege.

The Master: What is your position?

Mr. Haffenberg: I do not see how he can possibly waive—how he can possibly claim privilege here acting as counsel for the receiver.

The Master: I think, Mr. Haffenberg, there is a line there which may be drawn in the evidence, I do not understand the rules of evidence to mean that when a document is introduced in evidence you may go back into all the circumstances back of it.

Mr. Haffenberg: The affidavit filed by Mr. Harrison here sets up "that the plaintiff has heretofore

filed herein its motion to confirm sales made to it by the United States Marshal in each of said twenty-two cases, on July 1, 1932; that certain objections to said motion to confirm were suggested by reason of alleged commitments made by the plaintiff for the sale of certain of said properties, prior to public sale; that this affidavit is made of affiant's own knowledge and is for the purpose of advising the Court of all of the facts relative thereto." How can he possibly claim privilege?

The Witness: You have not asked me as to those facts.

Mr. Haffenberg: Then he sets up the contract. He says: "That the only offer received by the plaintiff prior to the sale was executed on June 27, 1933; that it was expressly conditioned on acquisition of title by the plaintiff; that it was not accepted until July 3, 1933, two days after the sale." That does not mean the offer might not have been made to him two months before the sale.

The Master: Read the question.

(Question read.)

Mr. Haffenberg: The negotiations for the purchase of the Madison County lands involved in the foreclosure suits.

A. I object for the further reason that any prior negotiations would have been merged in the written agreement, and it would be a matter of record in this court.

Mr. Harlor: You are trying to bury it.

The Witness: No, I am trying to bring it out.

The Master: I think you may answer.

The Witness: Yes, he told me something about them.

Q. Did Mr. Simkins tell you about that? A. I think he did tell me that Mr. Jones wanted to make an offer in the event of acquisition.

Q. Had you met Mr. Jones at that time? A. I do not know when I met Mr. Jones, as a matter of fact, I think I met Mr. Jones on the occasion of the first trip to

Cincinnati, about which Mr. Jones testified, to the best of my recollection.

Q. Mr. Simkins told you that he was representing Mr. Jones? A. At that time I think he had, yes.

Q. What were the names of any bidders or prospective bidders for any of the Pickaway or Madison County farms that called on you, or to your knowledge called on Mr. Simerman or Mr. Little in connection with the purchase of the farms involved in the foreclosure suits? A. The only one that I know about was a man by the name of Houser, that was in the fall of 1932.

Q. Did you receive any communication from any of the parties interested in Ohio advising you of prospects being interested in the purchase of the lands? A. I do not know of any, Mr. Simkins told me that he thought that if these properties were acquired, and improved, and held for a while, he might find some buyers, as far as knowing any prospects I do not believe he did.

Q. Did Mr. Simkins tell you how much fee he was going to get from Mr. Jones? A. No, sir, he never did, and I never learned.

Q. Can you advise the Court in a general statement now what delayed the filing of the two receivers' final accounts? A. Yes, I am very glad to do that. Much ado was made of that in last week's hearing, and a good deal of implication was left.

About the 7th day of May, 1934, in response to a telephone call from Judge Hough, I came to Columbus, and met with both receivers in Judge Hough's office. As I recall, the basis for the telephone conversation, it was this, Judge Hough called me and said "the receivers are here and they have their final report, and since your client seems to be the only one who can possibly be interested in that I think you ought to be present at the time they are filed", and then pursuant to this conversation on the telephone, this meeting, which I think was May 7th, 1934, was arranged.

I went there in company with Colonel Florence who is here, and Mr. Simkins. As Mr. Little noted, these accounts do not include the final fee of either receiver. The accounts I think bear the date of some time in April,

1934, and they were held off until that time because there was a quantity of wheat, I think about ten thousand bushels that they were holding for the crops, and the reports were held up until that time, on that account.

We went in Judge Hough's chambers and, if I am correct, Mr. Simkins had an original—I think there were three in all, an original and two carbon copies. My recollection is he also had a wallet or big envelope, which I did not see, but which at that meeting was described as containing vouchers and check stubs, and things of that sort.

The question was then raised of fees, and Judge Hough rather laughingly said to me: "You cannot get out of that and leave the question of fees to me", that is fees for the receiver, "You should know as well as I do what those fees should be." I said: "As far as my clients are concerned we are willing to leave it to the Court. The Court said: "The Court was not willing to leave it there." He said: "I will take a slip of paper, and give it to you, and you give your idea of what it should be, and I will do the same secretly." We had a good deal of fun because we each put down \$1800.00 on a slip of paper, and handed it across the table to each other. I think Colonel Florence will remember that circumstance. And then the Court said to the two receivers, Judge Hough did: "You may proceed to draw that much, and take credit in your final account of it then." Judge Hough said to me: "Your client is chiefly interested here, and I suggest that you take these reports, or a copy, and have them admitted, that is from the standpoint of whether or not you are going to make any objections, because if there is anything that is wrong it will be much simpler to have objections known in advance and get together with the receivers, and work them out, rather than to set them down for exceptions."

I took a carbon copy, I have at no time had the original of these reports, the copy which I took I now have in court, they are not backed, they are not endorsed, they are not signed, and that is the only copy which I ever had or which to my knowledge any representative of the Prudential Life Insurance Company ever had. That was in, as I stated, May, 1934.

Those accounts were checked over by the auditors for the Prudential Life Insurance Company, and it showed, as I remember, about \$5000.00 not counting the \$3600.00 to be deducted for the receivers' fees.

Q. May be you did not understand my question. I asked you if you could explain to the Court the occasion for the delay. A. That is just exactly what I am trying to do. I said the reports showed about \$5000.00, not deducting \$3600.00 for receivers' fees, or leaving about \$1400.00, balance.

The auditors of the Prudential Life Insurance Company who checked over these accounts found that the receivers had charged as expenses, not fees, but as expenses about \$6500.00 in receivers' expenses, and the Prudential Life Insurance Company did not feel that those expenses were justified. I was in the position of—I did not wish to file exceptions to these reports, and my client did not feel that the reports were correct as to those expenditures. I think I may say in fairness to my client that I was solely responsible for not sending my office copies back because I hoped to reach some agreement. I wrote to the receivers and suggested that I thought their charges for expenses were too high, and they should make some reduction in what they claimed in credits for expenses, and if that was done, no exceptions would be filed by the Prudential Life Insurance Company.

That is the whole story in not returning the originals, because I never had them, I only had carbon copies which I understood were office copies, evidently there was some misunderstanding, because I never had any idea for an instant that I had a court paper or anything that was filed, or that was wanted in the files of the court. I later advised Mr. Ingalls that I had only carbon copies which I understood were my own office copies.

Q. Judge Hough gave those reports to you for the purpose of checking up and reconciling with the receivers' reports and if there is any difference to straighten those out with the receivers? A. That is right.

Q. That is the only explanation you can give for the delay from May 3rd, 1934, to this time? A. That is

correct. I did attempt to straighten out those differences unsuccessfully.

Q. Did you advise the receivers wherein those differences lay? A. The Prudential Life Insurance Company thought the charges were excessive, it was not a matter of discrepancies.

Q. Thought they were not proper? A. Excessive.

Q. Not necessary? A. I do not know as a matter of totology.

Q. In what way were they excessive? A. We had a feeling that the expenses of the receivers of \$6500.00 for the period of time seemed to be an excessive amount of expenditure.

Q. You knew from your previous experience or other experiences with Mr. Simkins that his accounts bore watching, did you not? A. No, that is not correct.

Q. Did you have any other difficulties with Mr. Simkins in connection with reports or accountings? A. I had one matter in which a guardianship fee remained on their books for some time, and which Mr. Simkins advised me was involved in the settlement of his partnership with Judge Abernathy, that was Mr. Simkins' explanation of why the delay.

Q. Wasn't that sufficient to put you on your guard in connection with reconciling any differences in the receivership accounts when you say that the differences were represented by excessive expenses? A. I do not know that there is anything to reconcile, except the matter of charges, it is not a matter of accounting, not a matter of any money that is not accounted for.

Q. I take it the Court wants to adjourn. It is six-thirty.

The Master: I think we should. May I inquire as to whether you regard this last line of testimony as having now been connected or is that later to come?

Mr. Haffenberg: That will come, if the Master please. I would rather wait until we are through with the witness. As I understand, this is just a partial examination of Mr. Harrison.

Mr. Ingalls: Just one question might clear up the entire situation. Mr. Harrison, wasn't this affidavit marked Exhibit 4 discussed with Judge Hough?

The Witness: It was, after the sale, yes, sir.

Mr. Haffenberg: Just a moment. Three of us are attorneys. This affidavit was not on file until after the marshal's sale.

The Witness: I have a right to explain that.

The Master: I think you have been here long enough. Tempers are beginning to fray at the edges. We are going to adjourn this hearing until June 30th at ten o'clock.

Mr. Haffenberg: I take it all parties are to be present?

Mr. Claypoole: I think all the parties will probably be here.

The Master: If not, at least accounted for.

And thereupon the further hearing of this case was adjourned until June 30th, at ten o'clock, A.M.

HEARING

Before Honorable Gail H. Butt, June 30th, 1937.
Wednesday Morning Session, June 30th, 1937.

And thereupon the further hearing of this cause was resumed, same parties being present as at previous session.

The Master: Now, Gentlemen, with reference to the H. M. Crites case, which is numbered from 927 to 948, counsel for one of the trustees was in my office a very short time ago and informed me that he had a matter before the District Court which would have to be taken care of, and then he would be available. For that reason I told him we would adjourn this hearing until he would be free from the District Court. If you gentlemen will let us know where you will be, or will remain handy, we will call you as soon as he is free.

Mr. Haffenberg: Is this hearing he is engaged in here?

The Master: I understand it is here, but whether formal or informal, I do not know.

Mr. Haffenberg: May I ask if that is Mr. Harrison or Mr. Claypoole?

The Master: Mr. Claypoole. I happen to know something about the case, and I do know it is extremely important.

Mr. Haffenberg: He has not any idea as to how long that will take him?

The Master: He did not have then. I am going to talk with him and see if I can find out.

(And thereupon a recess was had).⁴

11:30 A.M.

Mr. Claypoole: I regret I caused a delay.

The Master: I understood you were unavoidably detained. However, I was mistaken in what I stated this morning, that you were before the District Court.

Mr. Claypoole: I was in conference with counsel.

The Master: You may proceed with the Crites hearing.

Mr. Haffenberg: If the Court please, may we proceed with Mr. Harrison?

The Master: Yes.

And also:

DAVIS HARRISON, resuming the stand, testified as follows:

Examined by Mr. Haffenberg.

The Witness: Mr. Haffenberg, I would first like to correct my testimony as to the details of the \$1000.00 payment. As I explained to you in the stipulation I testified on the former hearing that during the summer and fall of 1933 I received a thousand dollars from Mr. Simkins. That is not technically correct. I received \$500.00 from Mr. Simkins. I then received \$300.00 by check from the Prudential Insurance Com-

pany, which amount I understand was deducted from a total due Mr. Simkins, and was deducted at his instruction. And then in November of 1933 I received an additional check of \$200.00 from the Prudential which was likewise deducted from a remittance to Mr. Simkins, and deducted by his direction. That explanation is for the purpose of reconciling my former testimony with the facts which I have discovered since that time.

Q. That was in pursuance of an understanding you had with Mr. Simkins? A. That, as I testified, was what I suppose you would call in pursuance of an understanding with Mr. Simkins, that if he did collect substantial fees out of the sales of any of these farms that he would take care of me. That was as far as any agreement went.

Q. Your understanding was that was from a substantial fee that came from Mr. Jones? A. I assumed a substantial part of it.

Q. Mr. Harrison, did you bring with you any statement of the accounts of the Prudential Insurance Company with the Crites mortgages? A. I checked the original mortgages and the only advancements which the Prudential made to the receivers were those shown in their reports totalling about something less than \$18,000.00.

Q. The question was did you bring in the statement of account? A. No, I did not bring in the original records. I can testify from those records, I examined them, and I am willing to testify as to what those records show.

Q. Is there any objection on the part of the Prudential to furnish a transcript of that account? A. No.

Q. Will you furnish the same and file it in this Court before the hearing is completed? A. Subject to their objection. There is nothing in those files which you could not have learned about, Mr. Haffenberg, by simply asking for it, without charging fraud, and I examined those, and I can testify just what they advanced to the receivers.

Q. Let me ask you as to one check for \$2200.00, do you know how that was applied by the Prudential? A. My understanding was that was applied in what I think was known as the Hitler case, to a reduction of principal.

That is my recollection of it. I remember something at the time the thing happened about a fire loss draft.

Q. Are you sure, now, it was to the reduction of principal? A. That is my recollection.

Q. Did the Prudential have several accounts with Crites, the receivers in the foreclosure cases? A. They had no accounts with the receivers, simply had a charge on a particular loan, all handled as a credit, or a debit with a particular loan.

Q. Can you tell how they distinguished as to advancements made or receipts received from the receivers from and after the time of the appointment of the receivers in the foreclosure cases? A. With a possible exception of the fire loss which was not from the receivers, that would be from the fire company under its fire policy. So far as I know they did not receive anything from the receivers, except there was some slight refund on taxes. I think that was a matter of a few dollars, because of an error of the amount. That is as far as I recall they ever received anything from the receivers.

Q. The receivers' reports filed in this case indicate that the receivers— A. If I may volunteer, I think you are inquiring about the item that shows credits on Prudential loans from the receivers.

Q. Of \$15,666.00. A. If I am not mistaken, that was by reason of an amount credited to the loan account on account of a farm.

Q. That was credited on the loan account? A. Not on the mortgage loan, but on a loan which the Prudential made to the receivers for the purpose of paying taxes.

Q. I asked you whether the Prudential had more than one account with Crites and the receivers. A. I have answered that.

Q. Did they have an account with the receivers? A. I said the only record they had was of a particular loan and when they loaned money to the receivers to pay taxes on the John Doe farm it was charged against that farm on its loan card.

Q. Against the loan and not against the receivers? A. Noted on the loan card, and did not go into the loan total. It was simply a loan which was made under the order of

court, and the Prudential was given a prior charge on the receivership proceeds to repay these intermediate loans made to the receivers.

Q. See if I get your statement right, the Prudential Insurance Company from time to time, after the foreclosure and the appointment of the receivers, made certain advancements to the receivers? A. That is not correct in this way, it was not from time to time. As I recall, it was just one advancement of a lump sum.

Q. How much was that? A. That was something under \$18,000.00.

Q. What was that advancement for? A. As I recall, \$901.00—it will all show in the receivers' reports—\$901.00 for insurance premiums, and if I am correct sixteen thousand five hundred and sixty-some dollars for taxes.

Q. There is an item here of taxes and insurance of \$17,558.00. A. That is correct.

Q. Is that the amount that was received by the receivers from the Prudential? A. Yes.

Q. What taxes did that pay? A. That would be taxes for the second half of 1931, I expect; and the first half of 1932, that would be taxes for June, '32, and December, '32.

Q. Do you know that reimbursed the receivers for the amount they advanced for these taxes? A. The receivers did not advance it. This money was loaned in an exact amount to be paid to the county treasurers. It was because the receivers had no funds, and rather than go to the bank they went to the Prudential.

Q. Why was that charged against the receivers? A. Because it was a loan to the receivers under the order of court.

Q. For the purpose of paying taxes on its property? A. Yes.

Q. Then it was an advancement to the receiver? A. Yes.

Q. Out of that advancement the receiver paid these taxes? A. And the insurance premium.

Q. The insurance loan went up \$17,558.00 more? A. No. Those were noted on the bond cards of the loan, simply to show charges against that principal loan. They

were not added to principal, or they were not added to interest. They are not shown in the judgment. They are not reflected in the judgment, simply a separate loan made to the receivers.

Q. Were those checks made payable to the receivers? A. I think they were made payable to the receivers, and the receivers then split those because they had two counties.

Q. And the repayment to the Prudential of that \$17,558.00 was in what manner? A. It was by crediting those,—what I have termed—intermediate loans, that is the \$17,500.00 aggregating that indebtedness of the receivers with the appraised value of the crops that were standing at the time of this marshal sale.

Q. When was that appraised value arrived at? A. I do not know whether that was before or after the sale, but it was while the corn—it was about the time of the sale, I think, probably it was within the next thirty days.

Q. How was it arrived at? A. The appraisers were selected. I think there were three appraisers, either appointed or approved by the Court, that went out there and made an estimate of the value to the receivers of the corn crop.

Q. And in that manner you adjusted the account between the Prudential and the receivers? A. Applied that much, and I think that left probably fifteen or eighteen hundred dollars still due on that intermediate loan, but that balance did not go into the judgment.

Q. And is there a balance owing to the Prudential from the receivers? A. On that item yes, there is.

Q. Can you furnish a transcript of the account of the Prudential with the receivers— A. They did not have any account with the receivers. I have told you three times that the only record that they have is a record of the amount as to each loan.

Q. Will you furnish a transcript of the account of any dealings that the Prudential Insurance Company had with the receivers from the time of their appointment down to date? A. There is no such record.

Q. I am going to ask the Court here to have you furnish such record. A. If you will ask the question in a proper way, I will answer it, yes.

The Master: I think you are making the record miles longer than you need to make it. You are wasting time in argument and you will be given time later to argue.

Mr. Haffenberg: I submit, if the Court please, what I am trying to get here is a transcript of the account between the Prudential Insurance Company and these receivers in whatever form it has taken place, and I believe that we are entitled to it.

The Master: You may be heard on that question later.

Q. You brought in the correspondence between the Prudential and yourself with these receivers? A. That is correct.

Q. Any correspondence? A. Yes.

Q. What correspondence have you brought in with reference to the acts and doings of the receivers? A. I have brought in some correspondence over a period of time.

Q. First of all, will you submit the correspondence that passed between the Prudential Insurance Company and the receivers with reference to the filing of the reports, and the application for their approval? A. I meant to bring that. I do not know why I did not. I can tell you almost verbatim what the substance was. That correspondence was within this year. I wrote a longer letter to Mr. Simkins, in which I told him that the Prudential Insurance Company felt that their charges for expenses were excessive and that—

Q. Mr. Harrison, we will come to that next. I am asking now with reference to the filing and application for approval of the receivers' reports. There is testimony here that there was some correspondence between you and the receivers, or the Prudential Insurance Company and the receivers with reference to these reports. A. You mean as to—

Q. As to delay. A. Yes, I will find that. There were several letters. Captain Ingalls wrote me six or eight letters wanting to know why the reports had not been filed.

Q. During the recess will you segregate those letters and let me have them after recess? A. You mean to turn them over to you?

Q. No; turn them over to the Court. A. I am not certain I have them. In other words, I could not bring all the correspondence that I ever had with Captain Ingalls or Mr. Simkins. I tried to follow literally what Mr. Harlor wrote me to have here, but if Captain Ingalls has any copies there will be no equivocation about using them. The substance of them was that Mr. Ingalls wanted to know why they were not filed, and I told him they were not ready to return them yet, and would file that later, but letters to Mr. Simkins and Mr. Florence to the effect that the company thought their charges were excessive, that was the reason that they had not been filed, and that I would send them back, and, if necessary, file exceptions. I also said if these expenses could be reduced to some reasonable amount I would not file exceptions.

Q. You have that correspondence with you now? A. I doubt it.

Q. Will you search through your files and produce that which has reference to the filing of the reports and the approval of the same? A. Yes, if I have it, and if I have not, I will agree that Mr. Ingalls may put in copies.

Q. Mr. Harrison, you testified that the Prudential thought that the charges of the receivers were excessive? A. Yes, that is right.

Q. And that the accounts had been checked by the auditors, isn't that correct? A. Yes.

Q. And was there any correspondence between the Prudential and the receivers with reference to such excessive charges? A. No, my letters are the only things that passed.

Q. Have you that correspondence with you? A. I told you I did not think I had. That was the correspondence I referred to.

Q. Will you produce that at the next hearing? A. I will, or I will agree that copies may go in.

Q. Copies will be satisfactory to us. Do you recall the substance of that correspondence? A. Just what I have related, a good many of those letters I answered, that the company was not satisfied with the reports, and the two letters to Colonel Florence and Mr. Simkins, that unless their charges for expenses were reduced I would have to

file exceptions, but I did not want to do it. That was the sum and substance of the correspondence.

Q. Do you know how much the Prudential had considered such expenses to be excessive? A. By what amount?

Q. Yes. A. I do not think any figure was ever mentioned. They simply looked at the total and estimated it over a period of months, and arrived at it in a general way, and perhaps had the feeling that it was excessive. So far as I know, there was never any figure stated, how much it was excessive.

Q. You stated you contemplated filing exceptions unless that figure was reduced or adjusted? A. That is right.

Q. How much did you contemplate filing exceptions to? A. I had no figure in mind. The thing I had in mind, and the thing that I told you informally about was as to the order that Judge Hough made, and I didn't know anything about it at that time, but that it was entirely satisfactory to me.

Q. How long did it take the Prudential to determine that the charges were excessive? A. I don't know how long it took. I don't know how long these copies were out of my office. I suppose two, three, or four months.

Q. As I understand the testimony, they were left or given you by Judge Hough in 1934? A. That is right.

Q. They have been in your possession or in the possession of the Prudential Insurance Company from that time until the early part of this year? A. Been in my possession, that is virtually all the time.

Q. When were they first presented to the auditors of the Prudential Insurance Company? A. Soon after I got them.

Q. In 1934? A. Oh, yes.

Q. Was there anything else with reference to those reports that the Prudential saw fit to take exception to? A. No. I think I would like to explain the attitude. I was in the situation of an attorney representing a client, and also in contact with two other men, an attorney with whom I had done business for a long time, and the other man for whom I had a high personal regard. I was faced with the situation of satisfying a client, and I did not care to go in

and file exceptions to a man's charges. If there is a goat in this thing I am the goat. I thought by holding those that some amicable adjustment could be worked out.

Q. The difference of opinion was solely regarding the excess of expenses? A. The part that the company felt was excessive, and I was trying to sweat the thing out without a controversy. That is the sole explanation of the delay. If anybody is responsible for it, I was. I may say that I at all times felt that all I had was an office copy and I was not holding up anything by keeping that office copy.

Q. You knew, as attorney for the receiver, that you would have to be advised of the application for the approval of those reports? A. As a matter of fact, I was not until after it was filed.

Q. I am talking about the application for the approval of the reports. A. That is what I am talking about. I did not know anything about the application for the approval of these reports until filed in February of this year.

Q. You knew the receivers were after you for the purpose of having that done? A. Yes.

Q. Did you advise the Prudential Insurance Company of their desire to have this estate wound up? A. Yes.

Q. What was the Prudential's excuse for delay? A. Just what I told you, that they were not willing to waive exceptions to the amount of expenses charged.

Q. When did they finally instruct you to waive exceptions? A. Oh, I should say it was a matter of probably two or three weeks before this first hearing, that is the hearing whenever it was, June the 2nd, very shortly before that time.

Q. Had they had a man down to check up with the receivers so as to reconcile the differences? A. Not that I know of.

Q. Did you file any exceptions? A. No.

Q. Did you file exceptions to Mr. Ingalls' fees? A. I filed an objection. That is not an exception.

Q. Did the receivers submit reports to the Prudential Insurance Company from time to time of their administration of this receivership? A. I think their field men probably—not probably—but I think their field men did go out and notice the farming on these different farms.

Q. What was the name of the field men? A. I expect Mr. Simerman, I imagine he did.

Q. Mr. Heiskell, did he keep in touch? A. Probably did. I don't know that Mr. Heiskell did.

Q. Did you prepare all of the orders obtained by the receivers? A. No, I prepared many of them.

Q. Are you acquainted with all the orders obtained by the receivers? A. I think so, except that order on expenses I testified about.

Q. I am talking about orders— A. Written orders, I think so.

Q. You were in constant touch with Mr. Simkins, and Ingalls and Selby? A. I was in touch with them, in correspondence most of the time.

Q. Have you any data showing the exact amount owing to the Prudential Insurance Company as of July 1st, 1933, on these mortgages? A. Yes, sir.

Q. Will you produce the same? A. Yes, sir.

Q. Please do so. A. I will be glad to testify from these figures. They are not entirely intelligent. I had them all taken off of the records.

Q. Are you willing to submit that as a statement showing the total balance due and owing to the Prudential Insurance Company on these twenty-two mortgages? A. Yes, but only with the right to qualify that by testimony as to two or three items which are not self-explanatory on the sheet.

Q. Suppose you do that. A. First, the item of \$9,619.63, which appears as an investment profit on all of these properties is arrived at by computing all interest at the rate of five and one-half per cent rather than eight per cent, as called for by the contract. If the interest item is computed at the rate of eight per cent as provided by the contracts, rather than by five and one-half per cent, the net result of the sales of all these properties will show a net investment loss instead of net investment profit. One other item, which appears on the schedule, is not exactly accurate. I refer to the sale price of the Madison County farms, which appears to be \$254,700.00. That is not the amount of cash received for the farms. The amount of

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cash actually received was \$249,106.00. The difference is accounted for by the commission, or commissions on the sale price.

Q. Commission to whom? A. I am going to explain that. That was merely a bookkeeping item, because there were no commissions or fee ever paid to anybody. In other words, the sale set up on the books as the sale was \$254,500.00, in order that the commission which would be, what? —\$5,596.00, might be considered as an item to take up slack somewhere else in the investment.

Q. That is a hypothetical figure? A. Hypothetical commission which did not represent any passing of money, because no commission was ever paid out of that sale. I think as far as I know with those exceptions this represents the company's investments. There are two other items, however, which would properly go into the question of cost. The first of those is interest on the Madison County investment from the date of confirmation to the date of sale, which is not added. There is also the item of interest which should be added on the Fullerton properties from the date of acquisition to the date of sale which is not included. If those items are added, it would increase the actual investment loss based on the contracts.

Q. Will you state how much was the total indebtedness including all charges on the Madison County lands as of July 1st, 1933, owing to the Prudential Insurance Company? A. I will have to testify to that from work sheets taken off from this. I perhaps can best answer that by saying that there will be a slight difference, whether that is computed from the basis of taking the judgments and the court costs, and items of that sort, for one system, and in taking the actual entries on the books as to the other system. Taking the judgments, starting with the decrees that were taken in May, 1933, to the best of my ability to make the computation the amount invested at five and one-half interest, rather than eight, in the Madison County farms was \$243,494.00.

Q. Is that of July 1st, 1933? A. No, that was the cost, the company's cost at the time of their disposing of the properties which was—well, the transaction was closed some time early in August.

Q. Isn't it possible to submit a transcript showing what the indebtedness was as of July 1st, 1933, with all explanations on it, to use as an exhibit? A. Yes, you can have this.

Q. We will use this sheet here as an exhibit, which, as I understand, represents what? A. That represents the book account of the Prudential Insurance Company on these farms with the exceptions of the modifications which I have testified about.

Q. When you mentioned the decrease—these judgments did call for interest at eight per cent after December, 1932, isn't that right? A. I can't say.

Q. From date of default? A. They speak for themselves.

Q. Can you get up a statement showing what the actual investment was, if I understand your term correctly, that the Prudential Insurance Company had in these mortgages as of July 1st, 1933? A. This instrument shows it.

Mr. Haffenberg: Will you mark that Exhibit 1 as of today?

And thereupon the computation was marked Exhibit No. 1 June 30th, 1937.

Mr. Harrison: This all goes in under the same objection and with the same leave as to a motion to strike, I am assuming that?

The Master: I think it may so go in. If I understand the situation, counsel has promised that he will connect all this line of evidence, and if he does not, it is subject to being stricken.

Q. You testified to payments of \$300.00 being paid to you? A. That is right.

Q. Out of a total sum due Simkins? A. Yes.

Q. This \$300.00 being paid to you by the Prudential Insurance Company? A. Yes.

Q. Was any of that sum due Simkins in connection with these farms that is not shown on these reports? A. I do not know what Mr. Simkins' arrangement was. I know there was a sum there that they were paying him, but what it was I do not know.

Q. That sum in there applied to the payment in November, of \$200.00? A. Yes.

Q. Both of those payments were upon orders from Mr. Simkins to the Prudential? A. I am satisfied that is the fact.

Q. Do you know whether this paper here of July 1st, 1933, gave effect to the adjustment that you made with the receivers on the crop settlement? A. It had nothing to do with it, because that did not enter into our debt on these farms at all.

Q. Referring to the exhibit that you have there, can you tell how much excess you received on any farms over and above the Prudential investment in that farm? A. Yes, if you go through and analyze it, it is all there.

Q. Referring to that exhibit, will you advise the Court what farm, and what is the amount of the investment, and the excess?

And thereupon a recess was taken until 2:00 P. M. of same day.

Wednesday Afternoon Session,

June 30th, 1937.

and also:

DAVIS HARRISON, resuming the stand, testified as follows:

Examined by Mr. Haffenberg.

Mr. Ingalls: If the Court please, at this time before going any further into this matter, I wish at this time to move the Court to compel the attorneys for Crites, Incorporated, to make a statement to the Court and to couple up what they expect to couple up with the line of testimony they are pursuing. To continue at this rate we are going to be on this matter several days. They have not shown in any way whereby they intend to couple up the testimony that they had in mind, and I think we would shorten this thing if they were forced to present that to the Court.

Mr. Haffenberg: I might state this, that we are pretty nearly through with this side of this case, or will be this afternoon, outside of some figuring work.

The Master: Does that satisfy your objection?

Mr. Ingalls: I would like to know about when we are going to terminate this matter, or if we have to go into some time tomorrow.

The Master: It will be necessary to complete it today or put it over. You may proceed. Your motion will be reserved.

Q. Mr. Harrison, I show you a letter of July 10th, 1933, A. Are those the letters I gave you?

Q. Yes. A. Then do not go through them, and they may all be marked as exhibits.

Mr. Haffenberg: I will introduce in evidence the following letters.

And thereupon the letter from Edwin F. Jones, dated July 10th, 1933, was admitted in evidence on behalf of Crites, Incorporated, marked Exhibit 2, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington C. H. Ohio, July 10, 1933.

Davis Harrison,
Indianapolis, Indiana.

Dear Mr. Harrison:

I instructed Mr. Little via phone how we wanted the deed to the Crites land made out but I was afraid that he did not understand me correctly, hence I am writing you. We want the deed made to H. Truxton Emerson per Mr. Proctor's instructions. Hoping that we are able to close the deal real soon, I am,

Yours respectfully,

Edwin F. Jones."

And thereupon a telegram from Edwin F. Jones to E. R. Little, dated July 14th, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 3, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington C. H. Ohio, July 14, 1933.

E. R. Little,

Would suggest that you have deed prepared and sent to company so they can execute same immediately after confirmation Tuesday are very anxious to close.

Edwin F. Jones."

Also a letter from Mr. Simkins to Mr. Little, dated July 19th, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 4, June 30th, 1937, and is in the words and figures following, to-wit:

"Circleville, Ohio, July 19, 1933.

Mr. R. F. Little,
The Prudential Insurance Co. of America,
1422-1434 Circle Tower,
Indianapolis, Indiana.

Dear Mr. Little:

I received my daily telephone call this morning from Mr. Edwin Jones. He reaffirmed his statement that Colonel Cooper Proctor was on his vacation and would not return for thirty to sixty days.

He now says that Mr. Mathews or some such name to whom the deed is to be made, has a check of Mr. Proctor's for the purchase price, and that Mr. Mathews is planning on going on his vacation on the 29th.

Mr. Jones is insisting that we, if possible, have the deed ready for Mathews before he goes on his vacation. I know that you are just as anxious to close this up as Jones is.

I wish that you would write to me stating just about when the matter can be closed, so that I can keep

Jones with a shirt on. Please send me those contracts with the indorsement of acceptance on them and the letter stating the condition of the release to Mrs. Crites, in accordance with our discussion yesterday.

With kindest personal regards.

Very truly yours,

Richard Simkins."

Also a letter from Edwin F. Jones to Mr. Little, dated July 24th, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 5, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington C. H. Ohio, July 24th, 1933.

R. F. Little,
Indianapolis, Ind.

Dear Mr. Little:

I was in the Guarantee Title and Trust Co's office to-day when Mr. Harrison talked with Mr. Place. Mr. Place told me that he would have all necessary papers to you by Wednesday morning. I don't want you to think that I am rushing you but my man keeps after me and seems extremely anxious to get closed this week account he is going away on or before August 1st, so I wish that you would govern yourself accordingly.

When you come with the deed I want you to bring a map of the farm, all insurance policies so that they may be assigned, and the pictures that Mr. Simerman said you had of the farm buildings. If you so desire you could take the deed to Cincinnati and I would meet you there, you can let me know if this is satisfactory with you.

Hoping that we are able to deliver the deed this week, I am,

Yours respectfully,

Edwin F. Jones.

N.B. I wish that you would send me a telegram stating when we might expect the deed so that I can show it to Mr. Emerson."

Also a telegram from Edwin F. Jones to R. F. Little, dated July 21st, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 6, June 30th, 1937, and is in the words and figures following, to-wit:

Columbus, Ohio, July 21, 1933.

R. F. Little,

Was at Guarantee Title and Trust said would deliver policies Monday morning.

Edwin F. Jones."

Also a telegram from Edwin F. Jones to R. F. Little, dated July 24th, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 7, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington C. H. Ohio, July 24, 1933.

R. F. Little,

Mr. Emerson going away must have deed this week when can expect deed also want farm plat insurance policies tax receipts pictures.

Edwin F. Jones."

Also a telegram from Edwin F. Jones to R. F. Little, dated July 27th, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 8, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington C. H. Ohio, July. 27, 1933.

R. F. Little.

Let no one know who gets title to farm phone me when ready to deliver deed.

Edwin F. Jones."

Q. All these exhibits you are willing to let the Court hear? A. Subject to the same objection.

Also a letter from Mr. Sawyer to Mr. Little, dated August 19th, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 9, June 30th, 1937, and is in the words and figures following, to-wit:

"Cincinnati, Ohio, August 19, 1933.

Mr. R. F. Little,
c/o The Prudential Life Insurance Company,
Indianapolis, Indiana.

My dear Mr. Little:

When I stopped in London this morning to leave the deed to be recorded, I was informed that the mortgages given to your Company and to the Mid-State Realty Company had never been cancelled of record. I would appreciate it very much if you would see that this is done. While we have the General Warranty Deed of the Prudential which is ample to take care of all encumbrances if any should arise, I would prefer to have the record itself indicate that the title is clear.

With kindest personal regards, I am,

Yours sincerely,

Charles Sawyer."

Also a telegram from Mr. Jones to Mr. Little, dated July 1st, 1933, was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 10, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington C. H. Ohio, July 1, 1933.

R. F. Little,
care Prudential Life Ins. Co.

Your attorney bid in farm for about one hundred sixty three thousand there was no other bidders as Prudential now owns it wish you would notify me immediately if my offer is to be accepted.

Edwin F. Jones."

Mr. Haffenberg: And that is timed at 4:50 P. M.

Q Are those letters that you produced all the letters that you or the Prudential have received from Mr. Simkins or Mr. Jones, or anybody representing Mr. Jones in connection with the matter? A. You mean pertaining to that sale, yes, sir. There is one telegram, Mr. Haffenberg, which you handed back, of the same bunch I submitted to you, and you passed it back. Here is the telegram of July 19th. I do not know that it means anything, but you are welcome to have it.

Mr. Haffenberg: I will offer this in evidence. I do not know why I handed that back to you.

And thereupon the telegram of July 19th was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 11, June 30th, 1937, and is in the words and figures following, to-wit:

"Washington, C. H. Ohio, July 19, 1933.

R. H. Little.

I know that you are doing your best however Cincinnati phoned me this evening and are extremely anxious to get deed they want to prorate insurance and will pay you for it so be sure and send all policies with deeds. Hurry.

Edwin F. Jones."

The Witness: I want to amend my answer, saying including the last exhibit. That is all I found in my files, or the Prudential Insurance Company files, either to Mr. Simkins or Mr. Jones, relating to the sale.

Q. Do you, from your own knowledge, know whether or not the Prudential Insurance Company received any correspondence accompanying the contract of June 27th, 1933? A. No, I do not. I do not know how that got to the Prudential Insurance Company.

Q. I understand that you had nothing to do with it? A. That is my recollection, that I did not. I may be mistaken, but I do not think so.

Q. I show you a copy of a letter written to you under date of May 15th, 1933, by Mr. Simkins, and ask you whether or not you recall receiving the original of that letter? A. Yes, I think I received that letter.

Q. Can you furnish the reply to that letter? A. I looked for it. I do not find it. I will say this, that if I do find it, I am perfectly willing to forward it to the reporter.

Mr. Haffenberg: I will ask that this letter be identified as the next exhibit number and introduce it in evidence.

And thereupon the letter of May 15, 1933, from Mr. Simkins to Mr. Harrison was offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibit No. 12, June 30th, 1937, and is in the words and figures following, to-wit:

May 15, 1933.

Mr. Davis Harrison, Attorney,
c/o Remy, Harrison & Remy,
Indianapolis, Indiana.

In Re: H. M. Crites.

Dear Mr. Harrison:

I have had numerous inquiries as to the amount due The Prudential Insurance Company on the various mortgages on the Crites farms. I wish you would have the amounts figured up on all the tracts to July 1st and forward to me.

Please authorize me also to have the County Auditors figure up the taxes due in each county on July 1st on each farm. This will take some time and I wish you would do this at once.

Very truly yours."

Q. Showing you Exhibits Nos. 13-A to 13-W, are these exhibits letters passing back and forth between you and Mr. Ingalls with respect to the receivers' reports? A. Yes, this correspondence represents the originals of letters from me, and copies of letters to me which I agreed this morning might go in in lieu of all originals.

Q. Or pertaining to the receivers' reports? A. Yes.

And thereupon Exhibits 13-A to 13-W were offered and admitted in evidence on behalf of Crites, Incorporated, marked Exhibits 13-A to 13-W inclusive, and are in the words and figures following, to-wit:

EXHIBIT 13-A.

"Sept. 24, 1936.

Mr. Davis Harrison, Attorney,
Circle Tower,
Indianapolis, Indiana.

Dear Mr. Harrison:

Re: Crites Matter

I am enclosing copy of application that I have filed in Federal Court relative to this matter. I have become tired waiting for some action and, together with Mr. Florence, we are going to force some action.

If you can get this report back to the Court before it takes action, I will appreciate it, otherwise, will have to let the Court pass upon the matter.

I regret very much that I find it necessary to take this action, but I wrote you about a year ago and you promised cooperation but nothing has been done.

Yours very truly,

C. C. Ingalls."

EXHIBIT NO. 13-B.

"Circle Tower, Indianapolis,
September 30, 1936.

Ingalls & Selby,
Attorneys-at-Law,
9 East Long Street,
Columbus, Ohio.

In re: Crites Matter
Attention: Mr. Ingalls

Dear Cap:

I regret exceedingly that you felt it necessary to take the step which you have taken in regard to these reports.

I certainly feel that you have misapprehended your remedy because certainly in no way has the Prudential Insurance Company been guilty of any contempt of court.

What happened in this case was that Judge Hough stated that rather than have exceptions filed to the final report, he preferred that the Prudential go over it in advance and see whether or not there was anything objectionable. There are some items which are not acceptable and if ~~you feel~~ that that is the best way to handle it, I shall see that the reports are returned to the receivers at once so that they may be filed and exceptions filed to the same. It has been my feeling all the time that the matter could be adjusted without the necessity for such action. If not, then that is the only course left open to us.

I am today addressing both Mr. Florence and Dick Simkins on the subject and I am assuring them that if they wish the reports, a copy of which they sent to us will be sent to them immediately.

Yours very truly,

Davis Harrison."

EXHIBIT NO. 13-C.

"Circle Tower, Indianapolis,
October 23, 1936.

Ingalls & Selby,
Attorneys-at-law,
Columbus, Ohio.

In re: Crites Receivership
Attention: Mr. Ingalls

Dear Cap:

Please advise me whether or not you have had any contact with the receivers and whether there is any possibility of an approval of these reports.

Yours very truly,

Davis Harrison."

EXHIBIT No. 13-D.

"Oct. 24th, 1936.

Davis Harrison, Attorney
Circle Tower,
Indianapolis, Ind. Re: Crites Receivership

Dear Sir:

I saw Dick Simpkins not long ago and he said it was perfectly all right with him for you to let the account be filed and make your exceptions.

I have not been able to discuss the matter with George Vorys but I do know he wants the account filed and settled.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-E.

"Nov. 19, 1936.

Mr. Davis Harrison, Attorney,
Circle Tower,
Indianapolis, Ind.

My dear Dave: Re: Crites Matter

I have discussed this matter with both of the receivers and they are insisting that you return the reports at once, so that there may be filed exceptions and then you may have your exceptions.

Will you please advise me when you mail these reports to the Court, as I would like to inspect them.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-F.

"Nov. 30th, 1936.

Mr. Davis Harrison, Attorney,
Circle Tower,
Indianapolis, Ind.

Dear Sir: *In re: Crites Matter*

At the request of the receivers, I am asking that you file at once all the final reports in this matter.

In my last letter to you, I dictated the letter, "George Florence", but the stenographer taking it, thought I said "George Vorys". You can reconstruct the letter reading George Florence instead of George Vorys.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-G.

"Dec. 10th, 1936.

Davis Harrison, Attorney,
Circle Tower,
Indianapolis, Ind.

Dear Harrison: *Re: Crites Matter*

Please advise me why these reports have not been filed with the Court.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-H.

"Circle Tower, Dec. 11, 1936.

Ingalls & Selby,
Attorneys-at-Law,
9 East Long Street,
Columbus, Ohio.

In re: Crites matter
Attention: O. C. Ingalls

Dear Cap:

I have been unavoidably delayed in answering your letters and in forwarding the receivers' report in this case. It is my belief and of course has been my recommendation that no exceptions will be filed and that your reports may be approved and the receivers discharged at once. I shall know definitely in the next two or three days and I shall withhold forwarding the reports until the Prudential has reached a final decision unless of course there is some reason to forward them by return mail and if there is, of course I shall be glad to comply with your wishes. Kind personal regards.

Yours very truly,
Davis Harrison."

EXHIBIT No. 13-I.

"Dec. 12, 1936.

Davis Harrison, Attorney,
Circle Tower,
Indianapolis, Ind.

Dear Davis:

Re: Crites Matter.

There is no grand rush about this matter. If you get these things filed within the next few days it is perfectly alright.

I heard nothing from you and could not understand why they were being withheld.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-J.

"Dec. 31st, 1936

Davis Harrison, Attorney
Circle Tower,
Indianapolis, Ind.

My dear Dave: *Re: Crites Matter*

In your last letter you indicated to me that within the next few days your report would be filed, but it has been nearly three weeks since I have heard from you and the report is not yet filed.

I must insist that the report be filed at once. Otherwise, I must press the application filed.

Yours very truly,

Ingalls & Warnick.

EXHIBIT No. 13-K.

"Circle Tower, January 4, 1937.

Ingalls & Warnick,
Attorneys-at-Law, *In re: Crites Receivership*
9 East Long Street, Attention: O. C. Ingalls.
Columbus, Ohio.

Dear Cap: There seems to be some misunderstanding somewhere along the line about the report of the receivers. As far as I know the only thing which we have is a copy of the report in each case. If the originals were ever removed by the Prudential it was without my knowledge. Please investigate and advise me.

Yours very truly,

Davis Harrison."

EXHIBIT No. 13-L.

Davis Harrison, Attorney
Circle Tower,
Indianapolis, Ind.

"Jan. 6th, 1936.

Dear Dave:

Re: Crites Matter

Don't know whether you have the original or second copy of the receivership report in these cases, but it is apparent that the receivers want the return of these reports at once.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-M.

Mr. Davis Harrison, Lawyer,
Circle Tower,
Indianapolis, Ind.

"Jan. 19th, 1937.

Dear Sir:

Re: Crites Matter

After a conversation with Dick Simpson, I went to court and looked all around again but the reports are nowhere to be found and we were advised that they have not been there.

Yours very truly,
O. C. Ingalls."

EXHIBIT No. 13-N.

Mr. Davis Harrison, Attorney,
Circle Tower,
Indianapolis, Ind.

"Jan. 25th, 1937.

Dear Sir:

Re: Crites Matter

I wrote you on January 6th, suggesting that you return what report you have. This thing has gone along so

EXHIBIT No. 13-O.

O. C. Ingalls, "Circle Tower, January 26, 1937.
Attorney-at-Law,
9 East Long Street,
Columbus, Ohio. Re: Crites Receivership

Dear Cap:

I do not understand your agitation about the copy of the receivers report which I hold. These were given to me by the receiver as my copies. They are not executed and therefore are not any part of any court record. They were not taken from the court. Therefore I can not see any occasion to ask for an order of court to return a private paper. I talked with Dick Simkins about this and Dick expressed no wish that I return this copy which is clearly my office copy. As one of the attorneys for the receiver I feel that I have a right to a copy. However, if the receiver or either of them advises me this copy is necessary, I should be glad to accommodate the receiver. Until that time, I shall keep my copies.

Yours very truly,
Davis Harrison."

EXHIBIT No. 13-P.

"Feb. 1, 1937.

Mr. Dick Simkins, Attorney,
Circleville, Ohio.

Dear Dick:

Please come up Wednesday at two o'clock P.M. unless I call you and bring all reports with you.

Yours very truly,
) O. C. Ingalls."

EXHIBIT No. 13-Q.

"Circleville, Ohio, Feb. 1, 1937.

Mr. O. C. Ingalls,
Attorney-at-law,
9 East Long St.,
Columbus, Ohio.

Dear Sir:

I am having copies of the accounts in the Crites Receivership made and will have them completed by the end of this week.

Very truly yours,
Richard Simkins
By M.E.Y."

EXHIBIT No. 13-R.

"Feb. 13th, 1937.

Mr. Richard Simkins, Attorney,
Circleville, Ohio.

Dear Sir:

Re: Crites Matter

I wish you would get your final reports up to me not later than the first of the week.

Very truly yours,
O. C. Ingalls."

EXHIBIT No. 13-S.

"May 12, 1937.

Mr. Davis Harrison,
Attorney at law,
825 Circle Tower,
Indianapolis, Ind.

In re: Crites Matter.

Dear Sir:

I am enclosing copy of an order of the Court setting the hearing and final account of this case on the 2nd day of June, 1937, at ten a.m.

Very truly yours,
O. C. Ingalls."

EXHIBIT No. 13-T.

"Indianapolis, May 14, 1937.

Ingalls & Warnick,
Attorneys-at-law,
9 East Long Street,
Columbus, Ohio.

In re: Crites matter

Gentlemen:

I note that the Crites matter is set for hearing on June 2, 1937, at 10 o'clock, A.M. Will you please forward by return mail the reports or petitions which will come on for hearing at that time. Because of other matters, it is important that I return these by return mail if possible.

Yours very truly,

Davis Harrison."

EXHIBIT No. 13-U.

"May 15th, 1937.

Mr. Davis Harrison,
Attorney at law,
612 Illinois Building,
Indianapolis, Ind.

In re: Crites Matter

Dear Sir:

I am enclosing copy of application made by myself in this matter. The other reports are copies of reports which you now have in your possession.

Very truly yours,

O. C. Ingalls."

EXHIBIT No. 13-V.

"Indianapolis, May 18, 1937.

O. C. Ingalls,
Attorney at law,
9 East Long Street,
Columbus, Ohio.

In re: Crites Matter

Dear Sir:

This will acknowledge your letter of May 15th and enclosure for which I thank you.

I think in fairness to you I must advise you that I shall appear and resist your petition. I think we might agree on some additional fee but certainly nothing comparable to what you seek. If you care to go into the matter of a possible adjustment, I shall be glad to negotiate with you.

Yours very truly,
Davis Harrison."

EXHIBIT No. 13-W.

"May 21st, 1937.

Mr. Davis Harrison,
Attorney at law,
Illinois Bldg.,
Indianapolis, Ind.

Dear Sir:

Re: Crites Matter.

I have your letter, stating that you are going to oppose the allowance of the fee requested herein. If you will go over your earlier correspondence in this matter, you will find there was question raised early, concerning fees, and I do not think you have any reason to raise any question about our application.

Very truly yours,
Ingalls and Warnick."

Q. Can you explain what disposition was made of the crops on the farms? A. As I recall, they were all sold with the farms, and the total purchase price received represents not only the farm but the farm plus the growing corn crop. That is as far as I know.

Q. By being sold you mean being sold by the Prudential Insurance Company? A. Yes, to its purchaser. I do not mean at the marshal's sale. When the Prudential sold they passed to their purchaser the growing crops. The receivers sold the crop to the Prudential by virtue of this court order, and then when the Prudential resold it their purchaser took the crops and the sale price includes the crops as well as the land.

Q. Do you know whether any release was executed by the Prudential Insurance Company to Mrs. Crites? A. I think there was when she bought a farm, I think she was released as to her personal liability. I do not know whether in whole, or in part, or as to one farm.

Q. Did you prepare that release? A. I rather think I did. At least, I saw it.

Cross Examination by Mr. Ingalls.

Q. Mr. Harrison, there has been something said here today about facts concerning Jones, made to Judge Hough, will you please state that? A. Yes, at the time of confirmation—

Mr. Haffenberg: May that go in subject to objection?

The Master: Yes.

The Witness: On the 18th of July, 1933, this offer had been made and had been accepted, and at the time of moving for confirmation I told Judge Hough of the nature of this offer, and of the price. That was in an open hearing, at the hearing on confirmation. Judge Hough said to me: "Harrison, this may be questioned when one or both of us may not be here, and I think as a matter of precaution it would be well for you to put something on file here embodying this offer". I went home, and approximately a week later I executed the

affidavit which has been introduced in evidence here as Exhibit 4, June 2nd, 1937. I mailed that to the clerk of the United States Court in Columbus, Ohio, and on the same day I wrote a letter to Judge Hough advising him that I had forwarded the affidavit to be filed in cause No. 927, and apologized to Judge Hough for having delayed in sending that affidavit, and that affidavit with a copy of the contract is on file as one of the papers in cause No. 927.

Q. Have you a copy of the letter that went with it?

A. Yes, I have a copy of the letter, both to the clerk, and the letter to Judge Hough.

Q. Have you had occasion to look in the clerk of the District Court's office to see whether or not the originals are there? A. I have not looked there, Mr. Ingalls.

Q. I hand you what appears to be a copy of a letter dictated by yourself, was that letter transmitted through the United States mail? A. It was, and was not returned.

Q. I hand you what has been marked as Receiver's Exhibit B, and will ask you if the same facts apply to that? A. It was transmitted through the United States mail and was not returned.

And thereupon the letters last above identified by the witness were offered and admitted in evidence on behalf of the Receivers, and are marked Exhibits A and B, and are in the words and figures following, to-wit:

EXHIBIT A.

"July 25, 1933.

In re: Prudential vs. Crites
Clerk U. S. District Court
Columbus, Ohio.

Dear Sir:

Enclosed herewith you will find affidavit which you will please file in the Crites suit #927.

Very truly yours,
Remy, Harrison & Remy"

EXHIBIT B.

"July 25, 1933.

In re: Prudential vs. Crites
Hon. Benson W. Hough
Judge U. S. District Court
Columbus, Ohio.

My dear Judge Hough:

I regret that I have been somewhat tardy in forwarding the affidavit covering the offer made to The Prudential Insurance Company on the Madison County Crites farms prior to sale.

I enclose herewith carbon copy so that the same may come to your attention, and I am today forwarding to the clerk for filing the original of the same.

Kind personal regards,
Very truly yours."

Q. Were you present at the marshal's sale? A. Yes.

Q. Do you know whether there were any other bidders present at that sale? A. I think perhaps in two or three cases there were. I don't remember distinctly, but I would say yes.

Q. Do you remember any at the Madison County farms?

A. I don't think so. I think Mr. Jones was present, at the Madison County sale, but of course, he made no bid.

Re-direct Examination by Mr. Haffenberg.

Q. Did you advise Judge Hough of negotiations that had been going on between Mr. Jones and Mr. Little, or Mr. Simerman, for some time prior to the marshal's sale?

A. I advised him that the offer was made prior to the marshal's sale.

Q. My question was did you advise him of these negotiations? A. I think so, naturally in telling him about this offer. I don't remember distinctly, but I assume I told him that they had negotiated.

Q. Did you tell him how much Jones was willing to pay for this property before the sale? A. Yes.

Q. Did you tell him that Mr. Simkins was representing Jones? A. I don't believe so. I don't recall that I did. I may have, but I cannot testify positively.

Q. Did you explain to Judge Hough why in the face of that offer you bid \$164,000.00 for the Madison County properties? A. No.

Q. Did you straighten the Judge out when he told you that in view of the fact that there was a deficiency of \$100,000.00 that the matter was entirely between you and the receivers, that is referring to the Prudential Insurance Company? A. I do not understand you.

Q. When you talked to the Judge, did you tell him that in view of the fact that there was a deficiency of \$100,000.00 that this accounting was between you and the receivers? A. That is what he told us.

Q. Did you tell him, as a matter of fact, that there was no deficiency because of this sale to Jones? A. No, I did not, because I assumed, as a matter of law, the judgment still stood. We negotiated with Mr. Harlor after that for the deficiency.

Q. Did you tell the Judge that the Prudential Insurance Company were pressing Crites, Incorporated, for that deficiency of \$100,000.00? A. I don't know that I did. I don't know that they were pressing Crites, Incorporated.

Q. Did you tell him that? A. No, I didn't tell him that. I didn't say anything about pressing.

Q. Did you tell him anything about waiving your claim against Crites, Incorporated, because of having realized enough for your mortgage indebtedness? A. I rather doubt it, I may have, but I would say no.

Q. Did you, or the Prudential Insurance Company, tell Judge Hough of the attempt of Crites, Incorporated, to work out a deal with the Prudential Insurance Company whereby they were willing to convey and turn over title to the property and enable the Prudential Insurance Company to come out whole, applying the excess in those cases against the deficiencies? A. I don't know whether that was ever discussed with Judge Hough. I would say no, that is my recollection.

Q. Did you tell Judge Hough that no charge was made to the Prudential Insurance Company for the use of all the machinery on the farm? A. I do not think so.

Q. You say Mr. Jones was present? A. I think he was present at London at the Madison County sale.

Q. Did he have any discussion with you after the sale? A. I think he probably talked to me, as I recall seeing him there. In fact, that may have been the first time I saw Jones, I do not know. I remember that he was there.

Q. That was your recollection of the first contact you had with him? A. I rather believe so. I might be wrong about it, may not have been the first contact, but I think it was the first time I saw him.

Q. Showing you this telegram of July 1st, addressed to Mr. Little, care of Prudential Insurance Company, Indianapolis: "Your attorney bid in farm for about one hundred sixty three thousand there was no other bidders as Prudential now owns it wish you would notify me immediately if my offer is to be accepted." Do you recall discussing the content of that telegram with Mr. Jones? A. No, I do not think he mentioned that telegram.

Q. The Jones referred to in that telegram was the same party who was willing to make the offer of \$249,000.00 for that property? A. I think that is the amount.

Q. Did you tell Jones at the sale that he had a perfect right to bid on that property there? A. I told Jones that anybody including his buyer had a right to bid on that property, and Jones said: "My buyer is not a buyer or bidder at the marshal's sale, and my buyer is only a buyer with a general warranty from the Prudential Insurance Company. Under no circumstances can my buyer be a bidder at this sale".

Q. Therefore, he waited until you got through with the sale? A. I do not understand what you mean by "he waited", he was there until it was over.

Q. During the marshal's sale he waited until you got through? A. Yes.

Q. He made no effort to bid in on the Madison County property? A. No.

Q. Any other bidders for the Madison County land? A. I think not.

Q. The only two prospects at the marshal's sale that were interested in the bid on the Madison County property were Mr. Jones and yourself? A. I do not know whether there were any prospects. I do not know about people that wanted to bid.

Q. That you knew of that were interested in acquiring the Madison County properties, at no time? A. I would say yes, with the possible exception whether Mr. Hauser was represented, I do not know. I met Mr. Hauser six or eight months before that. He made an offer of \$140,000.00. He may have been represented, but not to my knowledge.

Q. Tell the Court now why you did not bid in excess of \$163,000.00 in view of the offer made to you or to the Prudential by Mr. Jones? A. I think that is a matter of law. We bid the required amount, and the sale was confirmed. I do not know of any reason; it is quite the usual practice to start bidding at the minimum and buy wherever you can.

Q. Two-thirds of the appraisal? A. I do not know whether two-thirds or three-fourths in this jurisdiction.

Re-cross Examination by Mr. Ingalls.

Q. Was there any definite bid from Mr. Jones that the Prudential could accept before the Marshal's sale? A. No.

Mr. Haffenberg: I object. Documents have been offered—if any other bid or any other definite bid, let us find out what that bid was. We know that nobody could have bought it from the Prudential before they acquired it at the marshal's sale, so that there will be no confusion in this record, as I understand that offer of June 27, 1933, it was a definite offer for that property.

The Master: What is the question?
(Question read.)

The Master: What do you claim for that question, Cap.?

Mr. Ingalls: They have made claims here that there was a definite offer that could have been accepted by the Prudential Insurance Company trying to couple

up the Prudential Insurance Company in some way with a stiffing bid at the sale. I am inquiring whether or not there was any such bid that the Prudential Insurance Company could have accepted prior to the marshal's sale.

The Master: It may be admitted, but subject to being stricken. I think it is incompetent as propounded.

The Witness: Do you want to reframe your question, or shall I answer it as it is.

Mr. Ingalls: Answer the question.

A. No.

Q. Do you know of your own knowledge whether or not there was ever any effort made by anyone to buy this property at private sale prior to the marshal's sale?

Mr. Haffenberg: I do not see how there could be a private sale.

Mr. Ingalls: I am asking whether there was any effort.

Mr. Haffenberg: You mean to negotiate for the disposition of the property and take it out of foreclosure?

The Witness: Yes, there was.

Q. By whom? A. There was an offer made by a man by the name of Byron Rich Hauser, I think his name is spelled H-a-u-s-e-r. His offer was about—I am satisfied it was less than one hundred and fifty thousand. My recollection is one hundred and thirty or a hundred and forty thousand dollars.

Q. Was that offer communicated to you? A. To me, or the Prudential Insurance Company. I know it was made in writing, that is in the form of a letter.

Q. Do you know of your own knowledge whether an answer was made to that offer? A. The answer was that the Prudential did not own the property and in no position to make any sale. Any sale he might make should be worked out with Crites, Incorporated.

And also:

RICHARD SIMKINS called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Haffenberg.

Q. Subsequent to July 1st, 1933, you rendered service for the Prudential Insurance Company in and about the sale of these farm lands acquired by them at the marshal's sale, the Crites land? A. Yes, sir.

Q. What was the nature of those services? A. I assisted in selling the farms with the abstracts to be sent me, discussed the matter with the purchasers, had them in my offices when the deals were closed, and general line of work of that kind.

Q. You practically assisted them in the sale of all the farms excepting three? A. That is right.

Q. Those three being the Walling farm, the Fullerton farm, and the Whiskey Switch farm? A. That is right.

Q. In all of those transactions did their representative or agent cooperate and assist you? A. Yes, sir.

Q. What was his name? A. Both Mr. Simerman and Mr. Heiskell.

Q. They kept in close touch with you as to what you were doing? A. They were in almost daily.

Mr. Claypoole: I want this to go in subject to our objection as to immateriality of all of this line of testimony.

The Master: You are making the general objection that this entire line of testimony is immaterial, is that correct?

Mr. Claypoole: That is right.

Mr. Harrison: Don't you mean to limit that to Pickaway County in this question?

Mr. Haffenberg: I understood him to say all the farms.

The Witness: I assisted on behalf of the Prudential Insurance Company in the sale of all of the Pickaway County farms, with the exception of the three known as the Whiskey Switch farm, the Hitler farm, and the Walling farm. In the sale of the Madison County lands I did not represent the Prudential Insurance Company.

Q. Will your records indicate whether or not you were paid by the Prudential Insurance Company for any services rendered by you in the sale of the Madison County farms?

A. Yes, they show no payment.

Q. The Prudential Insurance Company knew then that you were representing Mr. Jones and receiving compensation from him? A. That is right.

Q. Is that one of the reasons why they were not paying you? A. I presume it is, yes.

Q. Did you have any such talk? A. No, I told them that he wanted to employ me for that purpose, and they said that was perfectly all right with them.

Q. Therefore, that was one reason why they were not paying you for disposing of those farms? A. I presume so.

Q. Before July 1st, 1933, can you name some of the prospects that were interested in purchasing some of these farms that were involved in the foreclosure cases? A. I had heard, of course, that Jones had a client that he said was interested in buying the entire Madison County tract. People by the name of Fullerton, a cousin of a family that lived in Chillicothe. The family generally lives in New York state, were interested in buying the Pickaway County farms. Then there had been an Amish settlement in Madison that were interested in buying the farms, they even had discussed it with Judge Hough. At least, he told me they had. Then a fellow by the name of Walter Goodman that I knew about. Outside of that I do not recall any names in particular. There was a lot of talk about them.

Q. You represented Mr. Jones? A. Yes.

Q. You represented Mr. Fullerton? A. No, sir.

Q. Did you receive any compensation from any of the purchasers of these farms other than Mr. Jones? A. No.

Q. Will you state what your compensation was from Mr. Jones in connection with the purchase of the Madison County lands? A. He paid me altogether \$2,797.00. On July 3, 1933, he paid me \$500.00; on July 8th, 1933, he paid me \$1,000.00; on August 18th, 1933, he paid \$1,297.00. As I explained to you, I do not know why that odd figure.

Q. You had rendered other services for Mr. Jones that were separated from the farms? A. I think I probably had a small debt there.

Q. How much, in your opinion, was the compensation that covered that portion of the services? A. Not to exceed a maximum of \$200.00.

Q. Two or three hundred dollars for those services? A. That is right.

Q. The balance of it represented fees paid you in connection with the Madison farms? A. Yes.

Q. And as a part of that fee that you gave Mr. Harrison? A. I gave him a check for \$500.00 on August 18th down at the Neil House. I think that was the day that Sawyer took the deed for the property, wasn't it? I am pretty sure it is, because I see Jones finished paying me on August 18th, and I have my cancelled check here.

Q. You say you were employed by the Prudential Insurance Company to represent them in the sale of these Crites farms subsequent to July 1st; tell us the nature of that employment, when and where it took place? A. I do not know as I was ever just generally employed by them. Mr. Little told me from time to time that a prospective purchaser would come up for those lands, and he would send the word into my office, and see that I was paid. Mr. Heiskell would bring some prospect in, or Mr. Simerman, as to selling a farm, and I always got paid by the Prudential Insurance Company for the services.

Q. Isn't it a fact that that course of dealings had gone on from some time prior to the marshal's sale? A. I don't think I had ever sold any farms for the Prudential Insurance Company, it had been a long time since I had anything to do with the real estate business anyway. I am sure I never sold any farms for them at private sale before that.

Q. This was the first? A. Yes.

Q. You did represent them in other matters? A. Foreclosure matters.

Q. With reference to these Crites lands, had Mr. Simerman and Mr. Heiskell and Mr. Little discussed with you the prospects before the marshal's sale? A. I don't think so.

Q. Where did you get the instructions with reference to the sale of these lands? A. I think I got them from Mr. Simerman and Mr. Heiskell.

Q. Did they state the price at which you would sell those lands? A. Yes.

Q. When did you receive that particular instruction? A. I think it was practically on the day of the sale.

Q. As a matter of fact, you and the Prudential people got together very closely after the marshal's sale if not the day of the sale? A. That is right. They had their figures as to what they had in the farm, and stated that was all they wanted for the property. Those figures they showed me; they stated what they had in the farm property. Now, that was also coupled with the conversation on their part about the finances of the purchaser, my recollection is three-fourths of that price.

Q. They went into details as to how the details could be handled, and told you what their particular figures were? A. Yes.

Q. And they practically gave you the facts upon which you could negotiate with the prospective purchaser? A. That is right.

Q. Did they include the Madison County lands in those negotiations? A. Not at that time.

Q. They knew, then, didn't they, that there was a deal pending for the Madison County lands? A. Yes, we all knew that Jones had a buyer. I do not think at that time that I knew who he was, but I learned a very short time after. Jones seemed rather hesitant about telling me who the buyer was.

Q. But the Prudential Insurance Company excepted the Madison County lands from being offered on the market? A. They did what?

Q. They excepted, excluded the Madison County lands from being offered on the market? A. I don't know as they excluded it. They understood, all of us, that there was a purchaser, possible purchaser for that Madison County land.

Q. Did they want you to sell the Madison County land? A. Never mentioned it to me.

Q. They knew of the Jones deal? A. I could not have been very active in the sale of Madison County lands. I

do not know anybody to amount to anything over there in that community. The only reason I could sell those farms in Pickaway County was because I knew people in Pickaway County.

Q. Did they tell you they had a deposit of \$3,000.00 on the Madison County lands? A. I don't think I ever knew that, I have no recollection of knowing a thing about that.

Q. Who of the Prudential Insurance Company negotiated with Jones? A. Simerman, and Little, and some other fellow connected with the outfit. What was his name?

Mr. Florence: Wolf.

The Witness: Wolf.

Q. Were you at the marshal's sale on July 1st? A. Yes.

Q. Did Mr. Jones talk to you before he sent this telegram to Mr. Little? A. No, I never heard of that telegram before. May I see that telegram? Was it sent from London, or Washington Court House?

Q. It was sent from Washington Court House. A. He must have sent that after he went back home.

Q. Mr. Simkins, in breaking down the receivers' reports, we find various disbursements that are not covered by former court orders. I have understood you to say in this case, as well as Colonel Florence, that you and Colonel Florence were allowed \$100.00 per month for expense money. A. That is right.

Q. Explain what that expense covered? A. Just at the end of the first couple of three months Colonel Florence and I came in to see Judge Hough, and we would go to these various farms in Madison County and Pickaway County, and we would keep track of our mileage; he would allow us certain mileage in our automobile, in our trips to Columbus, and what-not, and our meals and expenses incident to our trips, and that made quite a lot of bookkeeping of small items, and each one of those months it would run something in the neighborhood of \$100.00. He said: "Quit all that bookkeeping of that kind and I will just allow you \$100.00 each for your expenses, as you are going to have to go to these farms

regularly anyway". So we kept no further track of our expenses. I know I did not, and I do not think George did either. That did not include expenses such as telephone calls that were made in my office which sometimes ran quite high.

Q. Do I gather that did not include out of pocket cash?
A. I think it included out of pocket cash.

Q. Where do you draw the line as to what this \$100.00 covered?
A. Our automobile expense, and our current expenses that we had to pay ourselves out of our own money.

Q. You mean by that traveling expenses?
A. That is right.

Q. It did not have reference to any other expenses?
A. No.

Q. May be you did not understand my question this morning when I asked you whether or not your expenses ran above that, you took a gamble on that?
A. Yes, I understood that.

Q. You mean now this \$100.00 covered transportation expenses?
A. Yes, our expenses going back and forth to the farms.

Q. The same thing for Mr. Florence?
A. Yes.

Q. Abernathy and Simkins was the law firm conducted by you?
A. Yes, Judge Abernathy, I think, died in June or July, 1933, shortly after this receivership started.

Q. Any services rendered by Abernathy and Simkins or yourself in a legal capacity, for which compensation was paid?
A. That is by the receivers?

Q. By the receivers.
A. I do not recall.

Q. Was there any occasion for it?
A. None that I know of. If there were, they are in there.

Q. We would like to ask you to explain the following entries: on March 18th, Check No. 10 issued to Abernathy and Simkins, telephone and steno. and expenses, \$200.00.
A. That is right. What is the date?

Q. March 18th, 1932.
A. Mrs. Abernathy worked at my office after he left the office, after Judge Abernathy left the office. We prepared in my office all these leases on these various farms, and for that service the Court told us to pay Abernathy and Simkins. That is for serv-

ices, that is mostly stenographic services. Later on we were authorized to employ a stenographer.

Q. Telephone, steno. and expenses, when were you appointed? A. I forget when it was.

Q. Middle of February, wasn't it? A. I think it was.

Q. No court order on that? A. I don't know whether there was or not, it was done in open court.

Q. You had counsel then, didn't you? A. Yes, two of them.

Q. On July 9th, 1932, Check No. 143, Abernathy and Simkins, services, \$200.00. A. That is the same amount of work.

Q. Did that cover office overhead? A. No, stenographic services, bookkeeper, various items, and that is about the time, I should think, that we came to see Judge Hough about our expense account.

Q. On July 9th same year, the next check is to Mr. Florence, no explanation, for \$500.00, what is that for? A. Isn't there an entry authorizing the payment? Judge Hough made an order allowing some compensation about that time.

Q. No docket entry. A. There is one entry on allowing fees to the receivers other than the \$1800.00. May I see the check?

Q. Can you explain, Mr. Simkins, why you did not obtain more court orders for various expenditures? A. I supposed they were prepared. I know it was generally understood by everybody that was around in connection with the matter that Judge Hough had made the order about the \$100.00.

Q. I am asking you this question both for the enlightenment of the Court and ourselves. A. I supposed they had.

Q. Had you asked the attorneys to draw up orders for you? A. No, I had not.

Q. Here is this check No. 145. A. Have you a stub on that? some place or other? There ought to be some explanation about it on the stub.

Q. Will these books help? A. No, the check stub.

Mr. Claypoole: It has been testified before that the stubs showed what they were for. Do you remember anything about this, George?

Mr. Florence: When you add those things all up they come to \$100.00 a month. There were several months that we did not draw anything, and we got the \$500.00 all at one time. That is my recollection about it at this time.

(And thereupon a short recess was taken.)

Q. Mr. Simkins, you received \$250.00 fees under court order, did you not? A. Yes.

Q. And you also issued a check to yourself and to Colonel Florence for \$1800.00 additional fees? A. That is right.

Q. And the total amount as fees that you received out of the administration was \$250.00 plus the \$1800.00? A. That is right.

Q. This \$1800.00 was paid you pursuant to some arrangement with Judge Hough in his chambers? A. That is right.

Q. Is that correct? A. Yes, sir, that is right.

Q. Did you receive any other fees as fees in the administration of this estate? A. No, not out of the receivership.

Q. Did you receive any other fees? A. I had a check.

Q. In connection with this matter that you have not told us about. A. I had a check from Cap Ingalls for half of the fee that the Prudential Insurance Company paid him that came in two separate checks. I think the first check I had was \$250.00, and a short time after that I had another one, I sent that one back, and then subsequently received it again, so I received the \$500.00.

Q. Were there any collections made by your from tenants that were not included in these reports? A. No.

Q. Were there any outstanding accounts owed by the tenants? A. If there was I do not recall any, I know that we lost, for instance, one man that I recall, we lost the seed, but it was no use to try and collect it, he was absolutely broke. I think we were pretty successful in collecting all our outstanding claims. We loaned practically all those fellows money at different times.

Q. You say that the first check you received from Mr. Jones was on July 3rd? A. That is right.

Q. Where did you receive that? A. I do not know.

Q. Did it come in the mail? A. I do not know, I am rather inclined to think he gave it to me at my office.

Q. Do you recall the conversation at the time the check was handed over to you? A. No.

Q. Did he tell you anything about the deal having been accepted? A. No, I do not think it had been accepted.

Q. What was that payment for? A. It was to guarantee me as good faith in paying me, that he was in earnest about the transaction. You see, we all doubted very much whether he had a buyer. It seemed almost too good to be true, and there was no money in sight, and I thought he was doing a good deal of talking about a deal of that size with no money in it, and I insisted that he pay me something as evidence of his good faith.

Q. Do you know anything about a certified check for \$3000.00 that accompanied that contract? A. No.

Q. Did he tell you anything about that? A. I do not recall a thing about that. I remember that they asked me to make a definite offer, and accompany it with a substantial sum, but I do not know when that was. I have no recollection of it at all. It was not done at my office. I am certain of that.

Q. The sale, the marshal's sale was July 1st, 1933, and it was confirmed on July 18th, 1933, is that correct?

A. I do not know about the date of the confirmation.

Q. When did you consider your receivership wound up? A. I don't consider it wound up now.

Q. For what period of time did you charge for services? A. Up until the time we filed our account with Judge Hough.

Q. Did you file any report with the Court showing the services for which you expected compensation? A. Yes, a copy of it is here.

Q. The time of the services? A. Yes, I mailed you a copy, Mrs. Black.

Q. And the same type of report was filed for Mr. Florence? A. I think we handed it in as a joint report.

Q. Did you tell the Court anything about any division of fees between you and anybody else? A. No, I do not think I did.

Q. Did you give Mr. Jones a receipt for the check for the first payment to you? A. I do not know whether I did or not.

Q. I believe I asked you this morning whether or not you recall any contract with Mr. Jones with reference to compensation? A. No, I do not.

Q. Would you say there was, or was not, such a contract? A. I do not think there was.

Q. Do you recall anything in connection with the terms of your arrangement with Mr. Jones having been discussed with him? A. I do not, I do not know how we arrived at the figures taken.

Q. Do you know whether or not your compensation was contingent upon Mr. Jones' acquiring the Madison County property? A. I was to be paid if it was to be a successful deal.

Q. Is there anything in your records that would indicate when you first talked with Mr. Jones about the Madison County property? A. Nothing.

Q. Do you know about how long it was before July 1st? A. Well, it was probably about two weeks, it may have been as much as three, but it was some time before, I do not know.

Q. How many conversations did you have prior to July 1st, with Mr. Jones, and either Mr. Simerman or Mr. Little? A. I do not think I had any conversation with Mr. Jones where they were present prior to the sale, I do not think that Mr. Jones was in Mr. Simerman's presence at the Neil House that evening, he may have been, but I do not think he was, I do not think they ever met Mr. Jones at my office prior to the sale, but I do remember of his being at the Madison County farm sale, and I think he came on over to the Pickaway County sale.

Q. Did Mr. Jones tell you what he wanted you to accomplish for him? A. Yes.

Q. Did you tell Mr. Simerman or Mr. Little what Mr. Jones was anxious to accomplish through you? A. I think to the extent that I told them that Mr. Jones claimed he had a buyer and that he wanted to buy the farm himself and then resell it to his man, and Mr. Little said he did not think there was very much to the proposition, because

he did not understand that Mr. Jones' man could buy that sized piece of property and he much preferred knowing who he was going to deal with, and I asked Mr. Jones who his buyer was, and he said he did not propose to tell me at all, and I think it became a little too complicated for him to go through with it, and resell it otherwise, I doubt if he ever would have disclosed the purchaser to us voluntarily.

Q. When did he disclose the purchaser to you? A. I do not think I knew who that purchaser was until after the sale.

Q. Referring to this contract that you witnessed, what was the discussion with reference to that? A. I do not recall the fact at all.

Q. Are you pretty much blank about that? A. I do not recall.

Q. Do you recall the terms? A. Have you a copy of it here, is that the one that was accepted here?

Q. That is right. A. I do not recall that, no.

Q. Are the terms contained in that contract with reference to the deposit of \$3,000.00 on condition that the Prudential Insurance Company acquired it? A. That is absolutely blank to me, I do not recall a thing about it.

Q. Did you on behalf of the Prudential Insurance Company negotiate with Mr. Jones for terms that were incorporated in that contract? A. No, I did not have any reason to represent the Prudential Insurance Company in that contract. I had told them Mr. Jones wanted to employ me.

Q. Did Mr. Jones tell you who drew up that contract? A. I do not know.

Q. Did he tell you? A. I don't remember whether he did or not, I do not recall.

Q. Were you with him when he presented that contract to the Prudential Insurance Company? A. No.

Q. Did you forward that contract to the Prudential Insurance Company? A. I do not think I did.

Q. Do you have any recollection of having forwarded the contract, together with the certified check? A. Not at all.

Q. Did Mr. Little or Mr. Simerman talk to you about this affair? A. At various times they discussed the matter of Mr. Jones' prospect with me.

Q. Did they try to have you find out how good he was, who he represented? A. Yes, they wanted me to find out who the ultimate buyer was.

Q. Did they tell you how much he had offered for the property? A. No.

Q. The terms of the offer? A. No.

Q. Were these conversations prior to July 1st, 1933? A. Some of them were, we, of course, knew that he was in the market for somebody to buy the entire tract of land.

Q. Are there any liabilities of the receiver that have not been paid? A. No, except our last expenses, and may be a small amount on the bond to the bonding company. George probably has the statement of it, aside from that I do not know of any.

Q. Mr. Simkins, are those expenses included in your report? A. No, I think from September to May we did not take our \$100.00 a month allowance.

Q. You mean September, 1933, to May, 1934? A. I think that is the date.

Q. Mr. Simkins, in all of your dealings with this property or this matter, had you from time to time discussed with Mr. Harrison or representatives of the Prudential Insurance Company the various acts and doings of the receiver? A. Yes.

Q. Had you secured their acquiescence or approval of those things? A. Generally if it amounted to anything over a trifling amount one of their representatives would be around, and we would discuss it with him.

Q. Whatever was done in connection with the handling of this property was under the guidance, control and protection of the Prudential Insurance Company? A. I would not make it quite that strong, I would say that we discussed matters generally with Mr. Harrison and the representatives of the company, and oftentimes with Mr. Heiskell. I think Mr. Little came in on several different occasions, to discuss matters with us. There was a question there at one time about holding wheat that seemed to be a very good thing to do. We stored it in the elevators,

I think we discussed that pretty fully around with the different members of the company and with Judge Hough. Judge Hough was rather insistent that we keep on holding even after they advised us to sell it at the elevators.

Q. In going through these files I notice items for repairs and miscellaneous items that way. They would tell you whether or not they approved of them, and wherein they differed from your opinion or recommendations? A. That is right.

Q. In all those cases weren't the recommendations of the Prudential Insurance Company followed? A. Generally, I think they were pretty sound recommendations always. We repaired a few houses that were badly in need of repair, submitted contracts and reports to the Indianapolis office, and took the matters up generally with them, whenever we did anything like that.

Q. Did the Prudential Insurance Company through their auditing department or any other department call your attention to any excesses in your expense accounts as shown in your reports? A. I understand Mr. Harrison now says he wrote me a letter to that effect, but I have no recollection of any such letter.

Q. Did they specify wherein they were in excess either by correspondence or otherwise? A. Not to my recollection.

Cross Examination by Mr. Ingalls.

Q. Mr. Simkins, as receiver for the rents and profits from whom did you obtain your orders as to the management of these farms? A. I generally discussed the matter with the Court informally.

Q. Or with your co-receiver? A. Yes.

Q. You were under no obligation to the Prudential Insurance Company with reference to the management of the Crites farms? A. Oh, no, except they had a lot of money invested, and the Court would suggest that we take the matter up with them and see what they had to say about it.

Q. I hand you what is purported to be Receiver's Exhibit C. Will you tell the Court what that is? A. That

purports to be a daily statement of our activities as receivers.

Q. What do you mean by "our activities"? A. Colonel Florence and myself in taking care of these farms, we kept a calendar on my desk and he kept a little book he carried in his pocket, we would make these notations, and they would be copied from week to week by the stenographer, and from them she made this up.

Q. That is your daily calendar for the period of the receivership up to June, 1934, is that the date? A. Up till April 19th.

Q. Was that the date that your final account was submitted? A. I think our final account was filed about a month later than that.

Mr. Harrison: On May 8th.

The Witness: Now, the time between the 19th of April and the 18th of May was devoted generally by us in getting up our various reports, and that is not in there.

Q. After you filed your final account in May was there anything done by you or by Colonel Florence to keep this report from being acted upon by the Court? A. No, indeed.

Q. You knew what happened to the copies of the final accounts, did you not? A. I never knew whether they were the copies or the originals, but I knew Mr. Harrison took a set of them to Indianapolis.

Q. Did you have any correspondence with Mr. Harrison urging him to have the Prudential Insurance Company pass upon this? A. I think you will find some letters in those files there, in which I asked him if he had heard anything from them yet as to what the status of the thing is, and frankly I thought the accounts were filed. I thought that they had been formally filed.

Q. Having reference to an application for attorney's fees filed by myself in this matter, and assuming that there were four hundred and fifty-eight hours spent in behalf of the trust, would you say an application for \$1200.00 was a reasonable request plus expenses? A. I think it would be.

Q. You had an opportunity to observe the items of time and statements of O. C. Ingalls? A. I have not read your application over; I have not seen it, I have no doubt it is correct, I know you spent a good deal of time at different times on the matter, I think we had one lawsuit over in Madison County to collect a note or something.

Examined by Mr. Claypoole.

Q. You heard the testimony of Mr. Harrison today, did you not, and you heard his testimony with relation to the disclosure in court as to this buyer of the Madison County land? A. That is right.

Q. Were you there at that time in court? A. I think I was.

Q. At least you were aware of the fact that the Court had been advised? A. Yes, indeed, I knew about that.

Examined by Mr. Haffenberg.

Q. The report filed by you for services represents all the services for which you intended charging the estate, is that correct? A. Yes.

Q. Calling your attention to the entry of June 23rd, 1933, telephone conversation with Mr. Jones at Washington, is that the same Mr. Jones that is the purchaser of the property? A. I do not know whether it was or not.

Q. Does Washington mean Washington Court House, do you know of any other Jones there? A. It would indicate it was the same one.

Q. Calling your attention to the entry of June 25th, conversation in Columbus with Mr. Jones and Mr. Simerman, does that refresh your recollection as to that conference with Mr. Jones and Mr. Simerman in connection with this matter, June 25th, 1933? A. It may have been about that time, if it was, I know that I met them at the Neil House, as I told you.

Q. What was the subject of discussion at that conference? A. As I recall the thing, Mr. Jones asked me to meet him in Columbus and see if I could not get in touch

with some of the Prudential Insurance people, Mr. Simerman was in Columbus, I think I went to Mr. Simerman's room, and he called Mr. Little in Indianapolis. My recollection is that they never talked together at that time, I may be wrong about that, but I do not think I am, I do know that Mr. Simerman called Mr. Little about his answer to Mr. Jones, and that was that they could not have anything to do with the sale of this property until he acquired title.

Q. Do you recall they were both in Columbus at that time? A. Yes.

Q. Did they stay over night? A. I do not know, Mr. Jones and his brother were in a room together, and Mr. Simerman and another man of the Prudential had a room together.

Q. Calling your attention to June 26th, Crites' conference with Mr. Simerman and Mr. Jones, do you remember such a conference? A. Probably was, I do not know, I remember meeting them there.

Q. Various telephone conversations you had during that time with Mr. Little and Mr. Harrison, did they refer to your conference with Mr. Jones? A. I would not know.

Q. Calling your attention to the item of June 27th, conference at the Neil House with Mr. Jones and Mr. Sawyer, was that relative to the Madison County properties? A. No, at that time Mr. Jones told me, I recall, that now, that Mr. Sawyer was the attorney for his purchaser, I never met Mr. Sawyer there, I was supposed to meet him but he never came. He stayed over in Cincinnati, but I came up to meet him, Mr. Jones told me Mr. Sawyer was the lawyer who represented the purchaser.

Q. Do you remember writing a letter to Mr. Little on June 27th, re Contract to sell Madison County farms? I will read the heading: "A letter to R. F. Little, in re contract to sell Madison County farms". Does that refresh your recollection? A. It does not.

Q. Mr. Harrison, do you have that letter with you?

Mr. Harrison: I do not, but I think there is such a letter. If so, I will forward it, I do not have it with me.

Q. Who is Thomas? A. Thomas?

Q. Yes, on June 28th a letter to the Prudential Insurance Company *in re* sale of farms to Fullerton and Thomas. A. Thomas is a man who subsequently purchased one of these farms down there. He is a colored fellow.

Q. Will you produce that letter? A. If I have it, it is in the file there.

Q. Do you know what the contents of that letter were?

A. No.

Q. Do you know what the contents of the letter of June 27th were to Mr. Little, do you remember sending such a letter? A. No, I do not.

Q. Looking at your charge, will that refresh your recollection? A. It does not the least bit.

Q. You have not seen it yet? A. You have read it to me. I do not know who is—what the prospective purchaser even was in that regard. I wouldn't be at all surprised it was that Amish settlement over there.

Q. Showing you a letter dated June 27th, 1933, which I will ask that it be marked for identification as Haffenberg Exhibit No. 14, addressed R. F. Little, Circleville, Ohio:

"Please note in particular the manner provided for acceptance for this contract and that it provides that two copies be returned to my office after the acceptance. I think everything else has been fully discussed over the telephone. Mr. Simerman and I are fully convinced that Mr. Jones' buyer is as he has stated to us and as we have stated to you over the telephone.

Very truly yours,

Richard Simkins"

Was that letter sent by you to Mr. Little? A. Yes, that is unquestionably my writing.

Q. Is that the letter referred to in your memorandum charge of June 27th? A. It probably is.

Q. Is that the letter that accompanied the contract?

A. It probably is, I have no recollection of the contracts.

Q. Does that refresh your recollection? A. It does not.

Q. Did you destroy the copy of that letter? A. No, I have not seen the copy of that letter.

Q. You would have it in your office? A. It ought to be in my office. These are the only files I have. Have you a copy of that contract?

Q. May we have that exhibit here, the affidavit? A. Is this the contract that is mentioned in this letter, what is the date of that?

Q. The contract is dated June 27th, marked Exhibit A, and an affidavit of Mr. Harrison filed on July 27th.

A. I do not remember this contract at all. While I was present at the time the sale was discussed, I do not remember that being attached to it.

Q. What contract did you refer to in your letter of June 27th? A. I unquestionably referred to this contract.

Q. That is the contract between Mr. Jones and the Prudential Insurance Company? A. I have no independent recollection of it.

Q. Did you have a discussion there over the long distance telephone with Mr. Little? A. The letter would indicate that I did, but I do not recall it.

Q. Was your conversation in connection with the deal with Mr. Jones as to the Madison County farms? A. The letter would indicate that.

Q. Do you recall discussing terms? A. I do not recall the details.

Mr. Haffenberg: We will offer this in evidence.

Mr. Claypoole: Of course, that is objected to like all the rest.

And thereupon the letter of June 27th, 1933, was offered and admitted in evidence marked Haffenberg's Exhibit No. 14, subject to exception.

Q. Mr. Harrison, will you produce a letter to the Prudential Insurance Company from Mr. Simkins under date of June 28th, 1933, which appears on page 73 of the Receiver's bill of services?

Mr. Harrison: I will look through and see, I do not think I have a letter of that date.

The Witness: It is possible that that letter might be in my files under L.

Q. Will you search for that? A. Yes, I will.

Mr. Haffenberg: If the Master please, I wish to move that these letters that have been asked to be produced shall be produced by a certain time so that the Master can consider the evidence and facts before the Court, and then as to the manner of treating this report, Mr. Claypoole, Mr. Ingalls, and Mr. Harrison, attorneys' fees are on file here, the Court has before it the date when the receivership started, all the facts in connection with it. Supposing we let the Master pass on the propriety, correctness, reasonableness, and perhaps the element of surcharge without the necessity of filing objections or exceptions to these receivers' reports.

Mr. Harrison: I think you have to present an issue, I imagine so. I doubt if there is any issue that the Court can rule on.

Mr. Haffenberg: I do not understand it that way. If I understood the Court correctly today, the Master can pass on these if we agree to waive objections.

The Master: Mr. Haffenberg; one of us, I think, misunderstood the other.

Mr. Haffenberg: Perhaps so.

The Master: I was of the opinion when I was speaking to you that you were talking of motions made during the course of the hearing. If you are talking about the final issues I think it will become the duty of the final Master to pass upon those in the final instance, and make his recommendations to the Court accordingly.

Mr. Haffenberg: With reference to the objections, or would we be obliged to file objections for the Master to pass on?

The Master: The rule, as I understand it, would be the same here as in the District Court, that is you will tender your issue exactly the same way as you would before the District Court.

Mr. Haffenberg: Then what time would your Honor allow us to file the objections here after these exhibits are in?

The Master: What time do you think would be necessary?

Mr. Haffenberg: If we can get these letters, there must be about a hundred pages of transcript yet, I imagine, I would say about a week to ten days after the exhibits are in.

The Master: How long will it take the gentlemen to produce these?

Mr. Harrison: I want a list of exactly what is wanted, your Honor, I can report within forty-eight hours either that I do not have them or I will have them in here.

The Master: Suppose we should give you until Monday to produce the exhibits.

Mr. Harrison: You have three intervening holidays, Saturday, Sunday and Monday, most people will be out of their offices.

The Master: I do not know any reason why a man cannot look in his files even on a holiday.

Mr. Harrison: I will have mine back by that time.

The Master: The 4th of July will come in there. In that case, we better extend it. Let the record show that the exhibits will be required to be produced by the Wednesday following the 4th of July, and that the objector will have ten days after in which to file necessary papers.

And also:

O. C. INGALLS, called as a witness, being first duly sworn, testified as follows:

Examined by Mr. Harrison.

Q. State your name. A. O. C. Ingalls.

Q. What is your address and business? A. 1741 Chelsea Road, attorney.

Q. You are the Mr. Ingalls who was one of the attorneys for the receiver, who has filed for additional compensation? A. I am.

Q. Mr. Ingalls, you were present at the marshal's sale in these cases? A. I was.

Q. Do you know of anybody who was kept away from those sales or was instructed not to bid, or told not to bid at any of those sales? A. No, I do not know of anybody who was instructed not to bid, or told not to bid.

Examined by Mr. Haffenberg.

Q. You filed a petition for fees here? A. Yes.

Q. You charged the Prudential Insurance Company with stifling bids? A. If I might explain myself in that position—at the time I filed my application for compensation I was thoroughly convinced that Mr. Simkins had told me that the Prudential Insurance Company had taken out the original accounts in this case and had not returned them. I began back in 1935 demanding that these accounts be returned, and as I testified the other day, I charged Mr. Harrison with bad faith in keeping back these originals and not letting this come to trial, and I was probably piqued very much at the Insurance Company when I drew up this application. I probably would not have made this charge against the Prudential Insurance Company had I known that Mr. Harrison had only the copy instead of the original.

Q. You did not know Mr. Jones? A. I never saw Mr. Jones or heard of him.

Examined by Mr. Claypoole.

Q. Were you present when Judge Hough made the order to Mr. Simkins and Colonel Florence relative to the payment or allowance of \$100.00 a month for expenses? A. Yes.

Q. You were present when Judge Hough made that allowance? A. He stated it was not necessary to make a court order, part of the receivership routine.

Q. Do you know whether or not those expenses covered just automobile expenses or any other expenses? A. Well, it came up in this way, both receivers had items of automobile expenses, gasoline and oil expenses, over to London, and out on trips, meals, and Judge Hough said we might as well make that an even hundred dollars.

Q. Per month? A. Yes, per month per person.

The Master: Is there anything else?

Mr. Haffenberg: No, your Honor.

The Master: Will it be necessary that we have any more hearings?

Mr. Ingalls: I would like to make a statement on my own behalf. In my application I stated I spent four hundred and fifty-eight hours, I have received \$250.00 as compensation, and that in view of the statement the reasonable value of those services at \$5.00 an hour I would be entitled to much more money than the application called for, but in view of the fact that the amount left in this estate was so small I made my claim \$1200.00.

The Master: Have you submitted an application according to the rules?

Mr. Ingalls: I have.

The Master: You, of course, are familiar with these?

Mr. Ingalls: Yes.

The Master: Do you know whether there is money available now to pay your fees?

Mr. Ingalls: I am told there is \$1700.00 in the fund, there is also approximately \$1100.00 belonging to the Prudential Insurance Company in the hands of the clerk of the Court put up as security for the case.

The Master: When did you make your first application for fees?

Mr. Ingalls: My first application—it seems to me about three months after the receivership was in existence.

The Master: Did you make any more applications between then and now?

Mr. Ingalls: No.

The Master: That was for what, *ad interim* allowances?

Mr. Ingalls: An additional allowance in addition to \$250.00 allowed.

The Master: The \$250.00, did you regard that and ask it for partial payment for your services?

Mr. Ingalls: Yes, partial payment is what it was, so listed.

Mr. Haffenberg: I make an offer of all the exhibits marked for identification.

Mr. Ingalls: On behalf of the receivers we are offering those exhibits we have had marked, I think there are three.

Mr. Harrison: I am assuming that the same objections that were made as to the line of questioning likewise applies to the exhibits.

The Master: I think that is true, it will be my opinion that objections will stand to the whole line of testimony and evidence.

Mr. Harrison: Whether it will be necessary to make our motion to strike at this time, or whether we may make the motion of filing to strike to be followed by written motion filed after the pleadings are filed by Crites.

The Master: Without attempting to advise you as to the law in the case, I would suggest that you now make your motion into the record.

Mr. Harrison: At this time, on separate and several behalfs of the Prudential Insurance Company, the plaintiff in twenty-two equity causes, No. 927 to 948, both inclusive, and on behalf of the receivers here separately and separately considered, we now move to strike out all of the evidence, all the questions, all the answers, together with all the exhibits offered in evidence pertaining to any matter or matters other than the application of O. C. Ingalls for additional fees as attorney for the receiver, and other than the questions of the accounts of the receivers including only the receipts and disbursements by the receivers under their appointment by order of this court, and the objectors and exceptors now request the privilege to reduce these exceptions to formal written objections and motions to strike be filed hereafter.

The Master: That motion seems broad enough, you may have the permission to file it in writing.

Mr. Haffenberg: I take it your Honor's ruling will be reserved until the other objections are in!

The Master: Yes.

Mr. Harrison: May we stipulate then that copies of the receivers' accounts in each of the twenty cases which accounts were in the custody of Davis Harrison from May 1934, were each and all of them carbon copies, unsigned, unbacked, and not bearing any other mark of the United States Court.

Morning Session, Wednesday,
September 29th, 1937.

The Master: Nos. 927-948, inclusive, in the Matter of The Prudential Insurance Company of America, Plaintiff, *versus* H. M. Crites, Inc., *et al.*, Defendants, before the Referee and Master by reference of the United States District Court. This is a continuation of a prior hearing held in this matter before the same office.

Mr. Rosenbaum: Your Honor, some testimony had been taken before Judge Underwood, and I take it that this testimony will be considered by the Master as a part of the record before him?

The Master: I am of the opinion that it can be and will be.

Mr. Rosenbaum: It will be; just to be sure of that, I want to offer the transcript of the proceedings before Judge Underwood on the 2nd day of June, 1937, being offered as part of the record before the Master.

The Master: Is there any objection?

Mr. Ingalls: No.

The Master: With that understanding and agreement between counsel the other record made before Judge Underwood will be considered before the Referee, also before the Master. You may proceed. Mr. Simkins has been heretofore sworn; do you desire him to be re-sworn?

Mr. Rosenbaum: Yes.
(And thereupon Mr. Simkins was sworn by the Master.)

And also:

RICHARD SIMKINS, recalled as a witness, being first duly sworn, testified as follows:

Examination by Mr. Rosenbaum.

Q. I show you the first account of Richard Simkins and George Florence, Receivers, filed February 19th, 1937, in this case in this Court, Cause No. 944; that is your final account? A. Yes, I think it is.

Q. Is it? A. If that is the account that we filed in this Court, that is our final account in this case.

Q. Do you know if that is the one you filed? A. No.

Q. Can you tell? A. I can get my copy and see.

Q. Whose signature is that to the affidavit? A. That is mine and George Florence's.

Q. That is your signature on the past page of that final account to the affidavit? A. Yes.

Q. Who filed the account for you? A. I don't know; I don't recall.

Mr. Rosenbaum: Did you file this account, Mr. Ingalls?

Mr. Ingalls: I think so.

Mr. Rosenbaum: Is it all right to let the record show that?

Mr. Ingalls: Yes.

Mr. Rosenbaum: Let the record show that Mr. Ingalls filed the first and final account.

The Master: The record may so show.

Q. Calling your attention to item of October 7, 1933, under the pages entitled "Said Receivers credit themselves as follows: Credit on loan of the Prudential Insurance Company \$656.25"; can you explain that? A. The Prudential Insurance Company loaned us money to pay taxes, I think; they loaned us money on different occasions;

that is not a credit on the loan that they had on the farm; that is a credit on a loan that they made to us as receivers, if that is what you are getting at?

Q. I am asking that you explain that item. A. That is a payment we made them on a loan they made to us.

Q. Do you find any corresponding receipt in that amount from the Prudential Insurance Company? A. I do not.

Q. Did you pay any taxes? A. Yes.

Q. On that particular piece of property involved in Case No. 944? A. I think we did; we paid taxes on all these properties.

Q. Does your account show the payment of any taxes in this case No. 944? A. I cannot understand why we have no item of the taxes; I have no recollection of not having paid them in any individual case; I thought that we had paid them in all the cases, but if this account doesn't show it, we didn't do it. This is an account of what we received and paid out on this farm.

Q. Calling your attention to Receivers' Exhibit "C", to the entries under date of July 15, 1933, will that refresh your recollection? A. It doesn't help me any.

Q. As a matter of fact the Receivers did not pay any taxes on this No. 944, Mr. Simkins? A. Not unless this account shows it.

Q. The account does not show the payment of taxes by the receivers, does it? A. Then we did not pay them. The account shows our transactions in regard to that farm.

Q. Do you show any corresponding charge to yourselves for this \$656.25? A. Not unless the sale of the corn on September 20th would be a corresponding charge. You will recall that we sold that to the Prudential by order of Court on an appraisal made by appraisers selected by the Prudential or the Court, or possibly the receivers, but any way it was appraised by order of the Court and we sold it to the Prudential. Now it may be that Miss Lutz in making up this account credited—charged us, rather, with having received that amount from the Prudential in payment of that corn.

Q. Did you receive it in cash or as a credit? A. I could not tell you; Miss Lutz probably could tell you.

Q. But according to your account on September 20th, 1933, you charged yourselves as receivers in this Cause No. 944: Sale of corn, one-half of 75 acres, fifty bushels per acre, 1875 bushels at 35 cents, \$656.25? A. That is right.

Q. That apportions the proceeds of the corn on the premises described in this case, isn't that right? A. That is right.

Q. So that you would have either the corn or you would be entitled to the cash in amount of \$656.25? A. We either had the cash or it had been advanced to us prior to that time.

Q. Does your account show any prior advance? A. No.

Q. Do you know why \$656.25 was paid out of the assets of this particular case No. 944 to the Prudential? A. Unless they had loaned us that much to pay the taxes.

Q. Well, did they loan you that much to pay the taxes in this case? A. I don't know whether they paid them directly or whether we paid them but evidently that is a loan that we repaid the Prudential; Miss Lutz kept the books and account.

Q. You did not get any cash from the proceeds of the loan with which to charge you— A. The account does not show it.

Q. And you did not pay any taxes? A. The account does not show it was used to pay any taxes.

Q. As a matter of fact what you did, you treated the loan from the Prudential as a unit without applying it to any particular farm or any particular case? A. Oh, I think we apportioned it; the loan from the Prudential, as I recall it—understand, this is mere recollection because I did not keep the books, and Miss Lutz will be called and access made to these books and she can tell you all about it. As I recall it, the Prudential advanced us money in each individual case to pay the taxes on the land involved in that case, and of course we put it all in one bank account, but it was a loan made to that individual tract of land.

Q. But you do not show the proceeds of the loan in this account? A. Not unless—no.

Q. Suppose the Prudential did not pay the taxes, Mr. Simkins, in this case, how would that affect your account?

A. I don't understand the question.

Q. Suppose the Prudential made neither a loan to the receivers on this case No. 944 and did not pay the taxes, how would that affect your account in this case No. 944?

A. I may be very dense; read that question, will you, please?

(Question read.)

A. That is not true; I can't tell you how it would affect the account because if we repaid the Prudential for a loan in that case they did make us a loan or they paid the taxes, one of the two.

Q. Does your account show the receipts of the proceeds of any loan? A. No; unless the amount of these taxes was taken into consideration when we sold them that corn; that is the only explanation I can make of it.

Q. Did you examine the records in this case before you filed this final account? A. No; I had nothing to do with the record in the case.

Q. Do you know whether in this case there was a full payment of the mortgage indebtedness and the taxes and a surplus amount ordered to be paid into Court for the parties entitled thereto? A. I wouldn't know from the number of the case; if you could tell me what farm it was I think I could tell you, for I think I know the only one farm that sold for enough to pay the loan to the Prudential.

Q. I am showing you the entry in this case No. 944, filed July 18, 1933; will that refresh your recollection?

A. No; if I had the file in this case I could tell which one of those farms sold for enough—

Q. Showing you the balance of the file in Case No. 944, in this Court, will that refresh your recollection? A. I am inclined to think that this is the farm that sold for a sufficient amount and probably a slight amount in excess of the mortgage loan to the Prudential.

Q. And the taxes? A. Well, I don't know about that; I know this, there was one farm that sold for an amount slightly in advance of what the Prudential claimed they had against them, and that I think is the farm; the Barthelmas farm they called it.

Q. Showing you the Marshal's Report of Sale, weren't the taxes paid out of the amount of the bid at the Marshal's

sale? A. I see that there was some taxes there; I don't know that those were the—I don't know what taxes those were, whether they were the taxes that were delinquent and run over or whether they were the taxes due at that time; I can't say about that; but I see there was some taxes; my recollection is there isn't any question but what there is an amount due the Crites' account or somebody if they are authorized to take it standing in the place of H. M. Crites for a small amount if this particular farm sold for over and above the amount of the mortgage. Isn't that true?

Mr. Ingalls: I think that is true.

Mr. Harrison: I think that is right; I think there was \$100.00 or something like that.

The Witness: I had nothing to do with the receipts from the farm.

Q. Calling your attention to the attached receipt dated July 17, 1933, of E. L. Hoffman, Pickaway County Treasurer, No. 226, showing total amount of taxes due June 20, 1933, \$324.40, attached to the Marshal's Report of Sale; will that refresh your recollection as to who paid the taxes? A. No; I don't know whether these were the taxes that were due at the time of the sale or whether they were the taxes due when we took it over.

Q. The receipt shows that, the total amount of taxes due June 30, 1933, \$324.40, being the taxes due June 30, 1933, and all delinquent taxes? A. I guess that is a receipt for delinquent and current taxes.

The Master: Gentlemen, the Court is having difficulty in hearing what you say.

The Witness: I cannot explain the tax receipt to you; it is self-explanatory.

Q. Well, the tax receipt and the report of the Marshal's Sale shows that that tax was paid out of the bid at the foreclosure sale, isn't that right? A. Well, they speak for themselves; our account there shows what we paid out; I don't know whether we—now you ask me to tell you what the Marshal's report shows—

Q. No. A. Yes, you did; read the question.

(Question read.)

The Witness: Again I state to you that I cannot state any better what the report shows than the report itself.

Q. Then you cannot explain that \$656.25 credit that you take on October 7, 1933? A. No, I can't; Miss Lutz probably can.

The Master: May I see the Marshal's report?

Mr. Rosenbaum: Yes, sir. (Handing same to the Master.)

The Witness: The difficulty I have with the Marshal's report is that I am not able to state whether the Marshal's report shows that all of the delinquent taxes that was paid during our receivership was paid after the sale; Miss Lutz can tell you about that. I cannot. And the only way I can explain this credit on the loan to the Prudential—why, certainly I can explain that. The Prudential never paid us for their corn; that is the same amount, isn't it, \$656.25? They never paid us for that corn that they bought of us on that farm so we gave them credit on their loan which we got; if they hadn't loaned us anything on there, on this farm, it should go on their original mortgage loan.

Q. And in this case there was no further mortgage indebtedness after the foreclosure sale? A. If we didn't charge ourselves with any money that they paid us for taxes this credit should go on their original loan.

Q. But the bid price took care of the original loan? A. Yes, sir.

Q. So they would not be entitled to any credit? A. Oh, yes, yes, you are wrong about that; they had to pay in to the Marshal whatever they bid for the farm.

Q. \$7400.00? A. Yes. Now if they had been paid this amount on their original loan then there is just that much more balance due to whoever stands in the place of H. M. Crites.

Q. There would be \$656.25 more to whoever stands in the place of H. M. Crites? A. That would be my impression.

Q. In other words, the account should show instead of a deficiency between \$965.44 of the total charges and the total credits of \$1082.31, a credit of— A. Our accounts should not show that but the loan of the Prudential should show a credit on it.

Q. What loan of the Prudential? A. The mortgage loan, unless they loaned us money in that case and it doesn't look like they did, the mortgage loan of the Prudential should show that the receivers applied that much on the mortgage loan because we never had the money; you see, they never paid us that in money.

Q. But you had the corn? A. We had the corn and sold it to them so evidently the bookkeeper has put that down there—the original loan should show a credit of that amount.

Q. What original loan? A. The original mortgage loan; that would be my impression of it.

Q. Then while you still had the corn the loan had already been paid by the foreclosure sale, hadn't it? A. I don't know whether they paid any amount of money or not; I had nothing to do with that.

Q. You were aware of the foreclosure sale? A. Yes, but I had nothing to do with their payment to the United States Marshal.

Q. Then you paid the money to the Prudential Insurance Company without ascertaining whether they were entitled to that money? A. Oh, I didn't pay the money to them at all; they bought the corn from us and didn't pay us for it.

Q. But you allowed them to have the corn? A. Yes, that is right, we allowed the purchaser to have the corn.

Q. Then this is merely an offset on October 7th? A. That is right.

Q. So that you should still have \$656.25 coming to the receivers from the Prudential Insurance Company? A. We should have \$656.25 coming to the receivers from the Prudential Insurance Company unless the Prudential In-

insurance Company credited that amount on their original mortgage loan."

Mr. Rosenbaum: I would like to have the record to show in this case the Bill of Complaint sets forth the principal sum due the Prudential Insurance Company in the sum of \$6000.00.

I would like the record to show further that on May 2nd, 1933, in this case by decree *pro confesso* the Court found as recited in said decree, among other things, that by virtue of the acceleration of the maturity clause the entire principal balance thereon became immediately due and owing and that there is due to the plaintiff from the defendant Henry M. Crites the sum of \$6000.00 principal, with interest at the rate of five and a half percent per annum from September 25th, 1931, to the date of the filing of the petition, and with interest thereon at the rate of eight percent thereafter, all in the total sum of \$6710.93; that the Court further finds that said indebtedness is secured by a first mortgage lien on the real estate described in the Bill. The decree further recites: "It is therefore adjudged and decreed that unless the defendant Henry M. Crites or some one for him or on his behalf shall pay to the plaintiff the sum of \$6710.93, with interest thereon at the rate of eight percent per annum within five days from this date, together with the costs of this suit, the plaintiff's mortgage shall be foreclosed." The decree continues with other matters.

Q. Referring to Item March 5, 1932, wherein the receivers charge themselves as follows: "By amount of loan from the City National Bank of Columbus, Ohio; on Receivers Certificate \$150.00"; and referring to the item of April 16, 1934, under "What the Receivers credit themselves with", being "City National Bank & Trust Company, payment of Receivers Certificate, \$200.00"; can you explain the discrepancy of \$50.00 there? A. No, I can't; Miss Lutz may be able to do that.

Q. Will you give us your views? A. I don't understand that; Miss Lutz probably would be able to tell you about it.

Q. You can't explain then why \$50.00 more was repaid to the City National Bank than was borrowed on this case No. 944? A. No, I can't.

Q. Referring to the items, "Receivers credit themselves as follows", namely, the three items of December 31, 1932, "By stenographic fees and services, \$10.80; by George Florence on account of expenses, \$33.00; by Richard Simkins on account of expenses \$33.00"; to what do they refer? A. Why, those are items of expense that the Court allowed us on this \$100.00 a month allowance that we made apportioned according to the farms.

Q. You refer now to no written order entered in this Court, do you? A. I don't know whether it is a part of the record or not; it should have been.

Q. Well, you don't know if any written order was entered? A. I stated to you that I did not know.

Q. How was that apportioned? A. I don't know now whether it was apportioned according to the appraisal or not, but Miss Lutz could tell; we apportioned it either—I am inclined to think we apportioned it according to the appraisement; we apportioned the other expenses according to the appraised value; that was the only thing we had to go by.

Q. By the "appraisement" you refer to the appraisals in the report of the Marshal, attached to the Marshal's Report of Sales in each of these cases? A. I beg your pardon, we apportioned it according to the loans.

Q. On the basis of the principal of the loan? A. We must have apportioned it according to the loan because we didn't have any appraisal on it at the time; but Miss Lutz is the only person who will know about this; I can't recall.

The Master: While you are examining those papers we will take a ten minute recess.

And thereupon a short recess was taken.

The Witness: If the Court please, there is something about this account that I don't understand, and I have asked for Miss Lutz to come up; she is downstairs and I would like—

Mrs. Black: She isn't here today; we called up; she isn't here.

Q. There were other loans in other cases made by the receivers or borrowed by the receivers from the Prudential Insurance Company? A. That is right.

Q. The loan referred to on October 7, 1933, as "Credit on loans", would that be the loans in the other cases?

A. No, that was referring to this particular case.

Q. A loan in this case? A. That is what it has reference to.

Q. Was there a loan in this case? A. No loan excepting the original mortgage unless our account shows a loan and it doesn't, as far as I know.

Q. Calling your attention to a document taken from the files in Cause No. 945, marked "Filed February 19, 1937, Mary F. Grabe, Clerk", entitled "First and Final Account, on account of George Florence and Richard Simkins, Receivers", is this the final account of yourself and George Florence as Receivers? A. Yes.

Q. Does the affidavit attached thereto bear your signature? A. Yes.

Q. Calling your attention to item of September 20, under "What the Receivers Charge themselves", namely "By sale of corn, one-half of 200 acres sweet corn, at 35 cents \$1468.75" what does that represent? A. That is the sale of the corn that was growing on the farm at the time of the Marshal's sale which we had appraised and sold to the Prudential Insurance Company.

Q. Did the Prudential Insurance Company pay that price? A. That was supposed to be credited upon either a loan that the Prudential had made us to pay taxes or upon their original mortgage loan.

Q. Did the Prudential Insurance Company make you a loan in this case No. 945 to pay taxes? A. No, the only loan they made us in this case is \$89.09 for insurance, as our account shows.

Q. Calling your attention to item under October 7, 1933, of "What the Receivers Credit Themselves with", namely, "Credit on loan of the Prudential Insurance Company of America, \$1468.75"; can you explain that credit?

A. No, other than that if they had not advanced that

to us as receivers, that was supposed to be credited on their mortgage loan.

Q. Did you receive any statement from the Prudential Insurance Company at any time showing the mortgage balance at that time, mortgage loan balance at that time? A. No.

Q. Do you know if there was any mortgage loan balance at that time? A. No.

Q. Did the receivers pay any taxes in this case No. 945? A. No.

Q. Do you know how much the deficiency judgment was in this case entered on July 18, 1933? A. No.

Q. Other than this \$89.09 insurance advance of April 22, 1932, did the receivers in this case No. 945 owe any other money to the Prudential Insurance Company? A. They do not from the account.

Q. Calling your attention to Receivers Exhibit "C", page 79, under date of July 15, 1933, were any of the checks that were mailed to the Pickaway County Treasurer checks that covered the payments in Case No. 945? A. No; the numbers are not listed here; there are only 20—apparently 20 cases in which the taxes were paid through the receivers and there were 22 cases altogether.

Q. Calling your attention to the Marshal's report of Sale in this case No. 945 and the receipt for taxes therein of \$1466.56, for taxes due June 20th, 1933; and all delinquent taxes, that bill was not paid by you, was it? A. No.

Q. Did the receivers make any loan from the Prudential Insurance Company in any of the cases other than for insurance and taxes? A. Not to my recollection and not unless it is shown in the account.

Q. Then the receipts in this case No. 945 do not show other than the item of April 22, 1932, of \$89.09, any loans to the receivers by the Prudential Insurance Company? A. No, that is the only one.

Q. Referring to the items of expenses under the amounts the receivers credit themselves with, namely three times on December 31, 1932, in the final account of No. 945, namely, "Stenographic service and fees, \$37.80; George Florence on account expenses, \$115.50; Richard Simkins

on account services, \$115.50"; what are those items? A. They were items of expenses that were allowed by the Court under an order that he made; and I presume that the same amount would have been allowed Florence and myself; that that is an account of expenses and that is a mistake of the stenographer when she copied that; I imagine that should be on account of expenses.

Q. The order that you refer to is what order? A. The order that Judge Hough made allowing us \$100.00 a month for expenses in these cases to be apportioned according to the value of the farm, the loan value of the farm, the mortgage.

Q. At the time that order was made who were present? A. I think Mr. Ingalls and George Florence and I.

Q. Was any formal written notice served on any other parties to the litigation? A. I don't think so; not to my knowledge.

Q. How were those items of December 31st apportioned to this case No. 945? A. My recollection is that all items of expense were apportioned according to the mortgage loan on the farm; you see, we had no other criterion to go by since they had not been appraised. As far as I know, that was it.

Q. Referring to the items of November 15, 1933, being telephone expenses \$27.11, by George Florence on account of expenses \$42.00; by Richard Simkins on account for expenses \$42.00; what are those items? A. Those are the same items; our allowance for expenses did not include our telephone expenses.

Q. And you claim authority for those items under the same order as the December 31, 1932? A. All except the telephone expense; when the telephone bills came in, as far as mine were concerned, which involved calling Madison County from Columbus, the girl in the office ran through the bills and took the amounts out that were for calls in reference to these farms.

Q. Calling your attention to Journal in Cause No. 946, do you know what that document is? A. That is the original book of accounts which Miss Lutz kept in regard to the receivership.

Q. Well, Miss Lutz was keeping them for you and George Florence as receivers? A. That is right.

Q. Referring to the item on page 2, reading as follows: "August 1, 1932, Home Insurance Company, New York, for loss of barn, Farm No. 6, \$2200.00", crossed out in red ink, followed by a red ink explanation of "Payment stopped on check"; can you explain that? A. Well, my explanation is of course only my recollection, and my recollection is that this barn burned on this farm—or, rather, the barn burned on the farm in Case No. 945, known as the Hitler farm, which involved the land known as the Hitler farm, and the item in the account book in Cause No. 946, bearing date August 1st, 1932, for \$2200.00, should have been placed in the account book in cause No. 945.

Q. Now your account in Cause No. 945 does not show the receipt of any \$2200.00 from the Home Insurance Company? A. No.

Q. You did receive a check from the Home Insurance Company for that amount, didn't you? A. That is my recollection.

Q. Can you explain that transaction? A. Following the burning of the barn we notified the Insurance Company and they sent us a check, which was for \$2200.00; payment on that check was stopped. My understanding is that the Prudential Insurance Company received that check—another check for a like amount.

Q. Do you know about when? A. No.

Q. Will you describe the barn on the premises, on the Hitler farm? A. Well, it was a fairly good barn, as I recall it, it was a bank barn, with stalls for horses and a hay mow and a shed for implements.

Mr. Ingalls: If the receivers did not get the money for this, I see no reason for going into this.

The Master: Are you objecting?

Mr. Ingalls: Yes, I am objecting.

The Master: The objection will be overruled.

(Record read.)

The Master: Mr. Ingalls was just objecting to the entire line of testimony.

Mr. Ingalls: No, with reference to this barn.

Q. Was the barn totally destroyed? A. I understand it was; I was down there the night of the fire; nothing left but bricks.

Q. Were the premises ever rebuilt by the receivers? A. No.

Q. And during the time the receivers had possession of the premises was anything done towards restoring that barn? A. No.

The Master: Mr. Simkins, do you know whether or not the insurance on this barn was a part of the insurance which had been contracted for by the receivers?

The Witness: No, the insurance, my recollection is that the insurance was inherited with the receivership but it was insurance which the Prudential Insurance Company had required H. M. Crites to take out when he procured his mortgage loan.

Q. But on your account Item April 22, 1932, "The Receivers charge themselves as follows: \$89.09", is for the insurance on this farm, is it not; this account is in No. 945, the Hitler farm? A. That is right; I don't know whether that is insurance that we took out or not under those circumstances but I was under the impression that it was insurance that Crites had taken out and we had taken over—rather, we didn't take it over but I understood it was insurance that was on there when we took the farm over, as receivers; I would have to check that up to be certain.

Q. But this item of charge appears on your account for the insurance? A. That is right.

The Master: Do you know the date, upon which the barn burned?

The Witness: No; I could probably find it from my—no, I don't know the date and I probably can't find it either; I was going to say I could find it from my expense account but I couldn't.

Q. The barn burned after your appointment as receiver, didn't it? A. That is right.

Q. How long after the fire did that check come to the receivers? A. I don't know; I don't know.

Q. At or about the time of the foreclosure sale, did the Prudential Insurance Company or any of its representatives discuss with you anything about repaying the \$2200.00 to the receivers that was received from this fire loss? A. I have no recollection of it.

Q. Did they make any offer to you to pay that into the receivership? A. Not to my knowledge.

Mr. Rosenbaum: Mr. Harrison, was there any question the Prudential Insurance Company received that \$2200.00?

Mr. Harrison: No, there is none.

Mr. Rosenbaum: Have you any idea about the date?

Mr. Harrison: No, I think there is an affidavit in the file covering that which I furnished as part of my testimony; Mr. Haffenberg asked for certain things to be covered, and if Your Honor will recall, the time was fixed in the affidavit covering those items.

The Witness: I want to make a correction in my testimony; after we were appointed receivers we had the buildings on all these farms insured ourselves; those farms in Pickaway County, we had them insured with the agency of Hummell & Plum, and it seems to me the man in London was Webb Culp, or something like that; and we had a mortgage clause inserted in them in favor of the Prudential; that was done subsequent to our appointment on all these separate farms. I didn't remember that at the time.

Mr. Rosenbaum: I would like to read into the record Paragraph 9 of the Affidavit of Davis Harrison, filed before the Master on July 6, 1937.

Mr. Harrison: Isn't it all in the record?

Mr. Rosenbaum: Well, it is matter that has transpired since the last hearing and it explains that transaction of the Hitler farm. Paragraph 9 of said Affidavit reads as follows:

That the fire loss payment of \$2200.00 received from The Home Insurance Company on August 19, 1932, was applied by it on principal on October 5, 1932, on loan No. 135,887, which was property No. 16,629, cov-

ering what is known as the Hitler farm of 611 acres; that said credit appears in Exhibit No. 1 but was not taken into account in the judgment; that said error evidently occurred because counsel at the time received no memorandum of this credit and assumed that the principal balance at the time of judgment remained the same as at the time the suits were filed."

Q. Mr. Simkins, do you still have those checks from Mr. Jones to yourself that you had at the time of the last hearing? A. I didn't have any checks from Mr. Jones to me.

Mr. Ingalls: Mr. Jones has those checks.

Q. The checks you had at the time of the last hearing, were A. The checks I had at the hearing, the checks I gave Mr. Harrison—

Mr. Harrison: Just one check.

The Witness: I have a notation of the amounts that Jones paid me, but the checks, of course they would be returned to him. I have the check to Davis Harrison for \$500.00.

Mr. Harrison: The checks are in evidence, aren't they, Mr. Rosenbaum?

Mr. Rosenbaum: No, the checks are not in evidence; he made a statement of the payments.

Q. There is a check for \$500.00 on August 18th? A. That is right.

Q. Is that the only check? A. It is the only check I testified concerning.

Mr. Harrison: The record shows that is the only check Mr. Simkins gave me was \$500.00; that I received a check for \$200.00 from the Prudential and a check for \$300.00.

Mr. Rosenbaum: That is right.

Mr. Harrison: That is all in evidence.

(And thereupon the witness produced a check.)

Mr. Rosenbaum: The check produced is entitled "Guest Check" on the Neil House Company, dated Columbus, Ohio, August 18, 1933, Pay to the Order

of Davis Harrison \$500.00 (in figures) and \$500.00 (written out), drawn on the First National Bank, Circleville, Ohio; signed R. Simkins. Stamped on the face of the checks are the words "U. S. check tax two cents added to this check". It is endorsed Davis Harrison and is perforated "Paid 8/29/33" and bears two bank stamps, one marked 4D and the other marked "Paid through clearing house or pay to the order of any bank, banker or trust company; prior endorsements guaranteed. August 26, 1933, Fletcher Trust Company, Fletcher Savings & Trust Company, Indianapolis, Indiana."

It Is Stipulated, subject to the objections heretofore stated that certified copies of all mortgage releases affecting the eleven farms in Madison County, Ohio, in controversy in these cases may be offered in evidence in lieu of the originals, and without objection as to their being the best evidence; and that a certified copy of the deed from the Prudential Insurance Company of America to Mary Johnson covering said tracts, including the amount of revenue stamps thereon, may be likewise admitted in evidence without any objection as to the question of the best evidence, and all to be furnished to this Court and to become a part of the hearing as of this date.

Mr. Harlor: Dave, do you know of your own knowledge whether a separate release instrument was given by The Prudential Insurance Company in satisfaction of any liabilities she may have had on account of the mortgage debt?

Mr. Harrison: I remember something about—she bought one of the farms, didn't she? I remember something about the release at that time. Do you mean was there a release from personal liability aside from the release of a specific lien; is that what you are getting at?

Mr. Harlor: Yes./

Mr. Harrison: I don't know whether there was or not; do you recall?

The Witness: Yes, there was; she was released from any liability on the claim of the Prudential when she bought the farm.

Mr. Harrison: I don't just know; I remember it was discussed; that is as far as I can go; there was some controversy about it. Did she give back a mortgage or pay cash?

Mr. Harlor: She gave back a mortgage.

Mr. Harrison: I remember the question was up, but I don't know.

Mr. Rosenbaum: That question reminds me, Your Honor, we want to obtain a copy of the release. And otherwise we still want to check up on the question of taxes. Otherwise that would be all this morning.

The Master: You have no other witnesses this morning to examine?

Mr. Rosenbaum: No, except as we may check the taxes on these cases, because they are such a substantial item, and this question of this release of Mrs. Crites, on which we do not seem to be able to get the original. Mr. Harrison recalls there was such a one mailed to Columbus on October 3rd but has no recollection of its contents. It may have some bearing. If it does not, that would be all there is to it, but we think we would like an opportunity to check on it.

Mr. Harrison: It just occurs to me that in the absence of some showing of some effort to get that original and get it to the Court we should not have to take another day and have another hearing.

Mr. Harlor: I may say that I have tried to get from H. M. Crites some information and was informed by Mr. Crites there was such a release and he would try to locate it and send it to me, but he has not done so; whether he has not been able to find it or not, I don't know.

The Master: Are you of the opinion another hearing will be necessary?

Mr. Harlor: Not as far as I know now.

Mr. Rosenbaum: Not except as this release may be material and we might want to introduce that.

Mr. Harlor: Depends on what its contents may be.

The Master: Have you anything you want to present on the other side?

Mr. Ingalls: I have a few questions I want to ask Mr. Simkins.

Examination by Mr. Ingalls.

Q. With reference to the City National Bank loan, isn't it a matter of fact that that money was borrowed as a whole by the receiver without reference to any particular parcels? There was no allocation of this money from the City National Bank; you made one note for it, did you not? A. Yes, we issued receivers certificates for it.

Q. The point I want to make, you did not pay back to the City National Bank of Commerce more money than you borrowed, did you? A. Oh, no; I think it was borrowed all in one loan and then we apportioned it on our books.

Q. In one report here you show that you borrowed \$150.00 on receivers certificates on March 5th, 1932, in Case No. 944 and you repaid back \$200.00; explain that. A. I haven't any explanation for that except that this is a possible one; of course, we didn't pay the City National Bank any more money than we owed them but in apportioning the payment we may have allotted the money on the basis of the value of the farms according to the loans because that is all we had to go by. Then we may have made some other apportionment; that is the only explanation, the only way I can explain it, and to me that is not a satisfactory explanation; but I am sure we did not pay the bank any more than we owed them; we may have paid them more than we allotted to that farm.

Q. In that same report 944, what you charge yourselves with, received for corn on September 20th, \$656.25, your report stands then that you received \$656.25 for the sale of corn; this report is correct; and the same is true of 945? A. Yes, sir.

Q. Now with reference to the loan made by the Prudential Insurance Company, was that loan made by the

Prudential Insurance Company—for what purpose was that loan made? A. They loaned the money for two purposes, one the payment of taxes, the other the payment of insurance; as far as I know that is the only loan we ever had from the Prudential.

Q. That was made, was it not, for an aggregate amount? A. Well, as I recall it, we got the amount of the taxes on each tract and sent them a statement of that, showing how much taxes was due, current and delinquent, and they sent us one check for the whole amount.

Q. Do you remember the amount of that check? A. No.

Q. Do you remember whether that was \$16,650.40? A. That is, I imagine, about correct; we issued our checks separately to the clerk or to the treasurer of the two counties for taxes on each tract.

Q. Have you any explanation to make as to why the taxes were not paid in cases 944 and 945 out of the money from the Prudential? A. I have not; I don't know why we did not include those in the other two farms.

Mr. Ingalls: That is all. Put Mr. Florence on the stand—you can just answer from where you are, Mr. Florence.

I will ask you, Mr. Florence, have you any explanation to make about those two items?

Mr. Florence: I believe that the check would not cover the payment of the taxes all, and then the Prudential paid upon the other two farms. I remember carrying the checks over to Madison County and Pickaway County but just how it happened, it has been a long time ago now.

Mr. Ingalls: That is all.

The Master: Any questions by the other side?

Mr. Harrison: Pardon me, Your Honor, just one or two matters here. I would like to read into the record the order of this Court made March 5, 1932; I am reading from the order, omitting the findings that precedes the order:

“Now, therefore, it is ordered pursuant to the prayer of the receivers’ supplemental petition for authority and instructions, that said receivers be and they are hereby expressly authorized, empowered and

directed to borrow from the City National Bank and Trust Company of Columbus, Ohio, the sum of \$7500.00 and to execute and to deliver to said bank as evidence of said loan their receivers certificates in due form of law as per copy thereof attached hereto, filed herewith, by reference made a part hereof and marked Exhibit "A", and said receivers certificates when executed to be approved by this Court, and in said sum to be by said receivers apportioned among equity causes No. 927 to 928."

That makes clear the question of how this loan was made.

Now I would like to take the witness stand on the question of the payment of taxes as to the two farms; if I may. I will just go ahead and make a statement on that.

The Master: Is there any objection?

Mr. Rosenbaum: No.

Mr. Harrison: On July 14th, 1933, I mailed to the United States Marshal of this District a check of The Prudential Insurance Company of America in the sum of \$1790.96 in payment of taxes in equity causes No. 944 and 945. My recollection of the reason for paying those direct in those two cases is that on account of the appraisement if loans were made to the receivers in those two cases it would have necessitated a reappraisement of the properties because the amount at which they could have been bid in would have been in excess of the mortgagee's claim. That is my recollection of why the taxes were paid direct in those two cases.

Do you have any questions, Mr. Rosenbaum?

Mr. Rosenbaum: Yes, I have.

Q. By Mr. Rosenbaum: Do you recollect what the bids were in cases 945 and 944? A. No, I haven't any recollection of what they were.

Q. You were present at the sales? A. Oh, yes, I made the bids.

Q. In Case No. 944, calling your attention to Marshal's Report of Sales, how much was the bid that you made

on behalf of The Prudential Insurance Company? A. Well, I can only judge from the Marshal's return; I have no independent recollection of it; the Marshal's return recites that the bid was \$7400.00 but I couldn't conceivably remember the bids in twenty-two, of those cases four years ago.

Q. And showing you the Marshal's return or Report of Sale in Case No. 945, to refresh your recollection, do you recollect the bid by the Prudential Insurance Company at the foreclosure sale? A. No, I have no recollection of it.

Q. Does that refresh your recollection? A. No; I assume it is correct; that is all I could say.

Q. If the Prudential Insurance Company bid the sum of \$22,500.00 as reported by the Marshal and it were in excess of the judgment entered May 2, 1933, in this case, the Prudential Insurance Company would be obliged to pay cash to the Marshal, would it not? A. I think that is a question of law, but I imagine it would; I don't know how I could venture to express an opinion on it; it would be a natural result I would think.

Q. Well, in the Marshal's report of sale he took credit for \$1466.56 as being disbursed out of the bid of the Prudential Insurance Company? A. That is right.

Q. Wouldn't that result then in the Prudential Insurance Company having received a credit against its bid of the amount it had sent to the United States Marshal for taxes? A. That was a part of its bid.

Q. That was a part of its bid? A. Yes, it paid that amount of its bid by sending a check for taxes to the Marshal.

Q. That is what I am trying to bring out; that was also true in case No. 944? A. Yes, sir.

Mr. Rosenbaum: That is all.

The Master: Anything else of this witness?

Mr. Rosenbaum: No.

The Master: Anything else on either side then? Do you desire this hearing to be continued open or to be finally closed?

Mr. Rosenbaum: Well, I think we would like to check into that Crites thing and the matter of the

taxes in the other cases in view of what transpires in case No. 944 and '945; we would like to open for that.

The Master: Would there be any further evidence to be taken from the witness stand?

Mr. Rosenbaum: I doubt it.

Mr. Harrison: As to the taxes—what do you mean?

Mr. Rosenbaum: I want to verify the amounts of the payments purported to be paid by the receivers, etc.; I want to check those.

Mr. Harrison: It seems after all these hearings there has been ample time to check all those records; of course, it takes more of the Court's time than the rest of it, but I think this hearing ought to be closed.

The Master: Is there an objection to adjourning the hearing finally with the understanding that evidence as to these other questions may be put into the record without a hearing?

Mr. Rosenbaum: Do you mean on motion?

The Master: Yes, on affidavit or some other form.

Mr. Harrison: That is alright; we have no objection to that, if it is just going into the matter of record.

The Master: Is that satisfactory?

Mr. Rosenbaum: We can always come in on motion before a Special Master showing why additional evidence should be presented.

The Master: Yes.

Mr. Rosenbaum: Then suppose we close it on that basis.

The Master: Is it the intention of counsel on either side or both sides to present briefs?

Mr. Harrison: We assume the exceptors would file a brief and we would of course be glad to answer any brief they may file.

Mr. Rosenbaum: If it would be of any material assistance to the Court we would be glad to do it.

The Master: I think it would be of great assistance due to the length of this hearing. Do you know, Gentlemen, when you will be able to file your briefs?

Mr. Harlor: Would three weeks be too long a time?

The Master: Any objection?

Mr. Harrison: No.

The Master: And your brief when?

Mr. Ingalls: We can have it in a week.

(Conference off the record.)

The Master: In view of the statements of counsel, the exceptors will be given one month in which to file a brief, and a reply brief to be in within three weeks thereafter. If it becomes necessary you may apply back to the Master for permission to file out of time.

The record may show at the request of counsel that if a motion is filed by either side for a further hearing in this matter that the motion will be first heard at an oral hearing before evidence is taken.

And the foregoing was all of the evidence offered, introduced and admitted on this hearing of this cause.

RECEIVERS' EXHIBIT C.

STATEMENT OF GEORGE FLORENCE AND RICHARD SIMKINS, RECEIVERS, IN CAUSES NUMBER 927 TO 948, INCLUSIVE.

- • • • • • • •
- June 23 Telephone conference Florence and Simkins.
 Florence telephone expenses 25¢.
 Trip to Madison County, conference with tenants,
 Murry Brothers, Straley Brothers, Goble, Cecil
 Wilson, Graves and with Neil Guest.
 Simkins mileage 185 miles. •
 Florence mileage 71 miles. •
 Telephone conference with Jones at Washington.
 Telephone conference with Scott.
- June 24 Conference in Simkins' office, Simkins and
 Florence with H. M. Crites, Goble, Zimmer-
 man, Watts, Moody, Coats and Ackerman.

Trip to farms 15, 6, 4, 9, 1, 2, 10 and 11.

Florence mileage 80 miles.

Simkins mileage 24 miles.

By sale of corn Farm No. 10 Cause 947.....\$84.44

The following checks and receipts were prepared and mailed:

The Standard Oil Company\$61.00

Stenographic Services 15.00

P. R. Gibson 11.34

June 25 Crites conference in Columbus with Jones and Simmerman.

Simkins mileage 48 miles.

June 26 Telephone conference Florence and Simkins.

Florence telephone expenses 50¢.

Telephone conference with Ingalls.

Telephone conference with Davis Harrison.

Crites conference with Simmerman and Jones.

Trip to Pickaway County Farms.

Simkins mileage 46 miles.

June 27 Telephone conference with Vance Simmerman.

Telephone conference with R. F. Little.

Telephone conference with Davis Harrison.

Trip to Pickaway County Farms.

Simkins mileage 32 miles.

Conference at the Neil House with Jones and Sawyer.

Simkins mileage 48 miles.

Letter to R. F. Little in re contract to sell Madison County farms.

June 28 Conference with R. F. Little.

Letter to Prudential in re sale of farms to Fullerton and Thomas.

June 29 Telephone conference with Simmerman.

Telephone conference Florence and Simkins.

Florence telephone expense 75¢.

Conference at Simkins' office, Florence and Simkins with H. M. Crites.

Trip to Coates Farm and to Moody Farms.

Simkins mileage 38 miles.

Trip to other Pickaway Farms 32 miles.

Florence trip to Madison County farms 115 miles.

Telephone conference with Davis Harrison.

June 30 By sale of corn Farm No. 15 Cause 942....\$320.98.

Telephone conference with Harrison.

Telephone conference with Simmerman.

Simkins trip to Pickaway County farms 6, 9, 10, 11.

Simkins mileage 46 miles.

Florence trip to Madison County farms; 12 & 13, & 7.

Florence trip to Pickaway County farms 1, 2, 15 & 20.

Florence mileage and lunch expense, 140 miles, 50¢.

July 1 Trip to Madison County.

Sale of eleven farms.

Simkins mileage 140 miles.

Trip to Pickaway County farms.

Simkins mileage 36 miles.

Florence mileage 120 miles.

Letter to R. F. Little.

Conference in office following sales.

The following checks and receipts were prepared and mailed:

Stenographic Services\$15.00

J. B. Stevenson 40.45

July 3 Trip to Madison County and Mechanicsburg.

Conference with Gest. Arrangements for Thrashing.

Conference with Cap Ingalls in re entry in the Crites cases.

Madison County sales confirmed.

July 5 Conference at Simkins office with R. F. Little, Jones and Fullerton in re sale of farms.

Simkins trip to Cincinnati with Little and Jones.

- July 17 Letter to R. F. Little of the Prudential Insurance Co. in re acceptance of proposals.
 Trip to Madison County.
 Conference with County Auditor and Treas.
 Simkins mileage 128 miles.
 Florence mileage 102 miles.
 Florence expense 50¢
 Conference in Simkins' office with Moody, Lape, Coates and Crites.
- July 18 Confirmation of sales in Madison and Pickaway County in Judge Hough's Court.
 Conference with Mr. Simmerman.
 Simkins mileage 56 miles.
 Conference with Little, Harrison, et al.
- July 19 Letter to R. F. Little in re: transfer of deed for Madison County Farm.
 Florence trip to Madison County Court House.
 Filed deed.
 Florence mileage 92 miles.
 Florence expenses .75
 The following checks and receipts were prepared and mailed:
- | | |
|-------------------------------|--------|
| Clifford G. White | 2.90 |
| Mary G. Morris | 12.60 |
| Mary G. Morris | 147.50 |
| Madison County Recorder | 166.00 |
| Madison County Recorder | 20.40 |
| Madison County Auditor | 1.50 |
- July 21 Long distance telephone call Jones, Washington, C. H.
- July 24 Telephone call Jones, Washington, C. H.
 Conference with Moody.
- July 29 Florence trip to the Circleville law office.
 Conference with Goble, and Moody.

Simkins trip to Cincinnati with Carl Jones and
R. F. Little of Prudential Insurance Company.
Sale of 11 Madison County farms to Proctor.
Florence mileage 52 miles.

July 31 Letter to R. F. Little of Prudential Insurance
Company in re: Continuation of the Abstracts
on the Crites farms in Pickaway County.

August 4 Telephone conference with Florence and
H. M. Crites in re: Hitler farm.
By refund for expense of transferring
deeds in Madison County \$ 1.50
By refund for expense of recording
deeds in Madison County 20.40
By refund for United States revenue
stamps for deeds in Madison Coun-
ty 166.00
By refund for United States revenue
stamps for deeds in Pickaway Coun-
ty 147.50
By refund of expenses for recording
deeds in Pickaway County 12.60
By refund of expenses for transferring
deeds in Pickaway County 2.90

August 7 Florence trip to Madison County farms and
Mechanicsburg.
Florence mileage 72 miles.
Florence expense .75
Telephone conference with Florence, and
Jones of Washington, C. H. in regards to
trip to Cincinnati.
Simkins trip to Pickaway County farms.
Simkins mileage 31 miles.

August 9 Letter to R. F. Little in re: To checks from the
sale of the farms.
Telephone conference with Mr. E. F. Jones
in re: Crites sales.

Two long distance calls to R. F. Little in re:
 Crites Receivership.
 Simkins trip to Columbus.
 Simkins mileage 56 miles.

August 18 Simkins trip to Columbus.
 Simkins mileage 65 miles.
 Conference with Florence, Harrison, Little,
 Jones and Sawyer.

August 30 Letter to Madison County Recorder in Re:
 Receiver's Bond.

August 31 Telephone conference with Jones of Washing-
 ton, C. H. In Re: Abstracts.

September 26 Letter to Charles Sawyer inclosing can-
 celled mortgages on farms purchased by
 -Proctor.

MORTGAGE RELEASES.

Eleven Certificates of Norman K. Jones, Recorder of
 Madison County Ohio, certifying that the following re-
 lease of the described recorded mortgages, being the
 mortgages described in the aforesaid eleven petitions for
 foreclosures, appears in the margin of pages 281, 283, 285,
 287, 289, 291, 293, 295, 297, 299 of Volume 73, Madison
 County, Ohio, Mortgage records:

"August 4, 1933

The lien of the within mortgage is hereby released
 and discharged.

THE PRUDENTIAL INSURANCE CO. OF AMERICA
 FRANKLIN D. OLIER, *Vice President*
 E. J. MACIVER, *Assistant Secretary*

The above entered from original mortgage August
 30, 1933.

MARY A. BEATHARD, *Recorder.*"

Number 4090 Fee \$7.15

WARRANTY DEED.

KNOW ALL MEN BY THESE PRESENTS That The Prudential Insurance Company of America, a corporation organized and existing under the laws of the State of New Jersey, the grantor, in consideration of the sum of Two Hundred Forty-nine thousand One Hundred Six (\$249,106.00) Dollars, to it paid by Mary E. Johnston, of Glendale, Hamilton County, Ohio, grantee, the receipt of which is hereby acknowledged, has Given, Granted, Bargained, Sold and Conveyed, and does by these presents hereby Give, Grant, Bargain, Sell and Convey unto said grantee, Mary E. Johnston, her heirs and assigns forever, the following described premises situated in Madison County, State of Ohio, to-wit:

(Being the real estate described in the petitions for foreclosure in cases Numbers 927, 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947; descriptions omitted by stipulation.)

containing in all 4844.14 acres, more or less, and being the same premises conveyed to The Prudential Insurance Company of America by Paul H. Cresswell, United States Marshal, by eleven separate deeds, dated July 18, 1933, and being recorded in Book 112, at Pages 569 to 589 in the office of the Recorder of Madison County, Ohio; and all the estate, title and interest of the grantor in and to the same, together also with the grantor's undivided one-half interest in the growing corn crop.

TO HAVE AND TO HOLD said premises with the appurtenances thereunto belonging and all the rents, issues and profits thereof to the said grantee, her heirs and assigns forever, subject, however to taxes and assessments for the second instalment for the year 1933 payable in June, 1934, and thereafter, which the grantee herein assumes and agrees to pay as part of the consideration hereof and subject also to existing tenacies expiring on March 1, 1934.

And the said grantor, The Prudential Insurance Company of America, for itself and its successors and assigns, hereby covenant with the said grantee, Mary E. Johnston,

her heirs and assigns, that it is lawfully seized in fee of the granted premises; that said premises are free and clear of all incumbrances whatsoever, except the second instalment of taxes for the year 1933; that the grantor has good right to sell and convey the same as aforesaid; and that the said grantor, its successors and assigns, shall forever warrant and defend the same with the appurtenances thereunto belonging unto the said grantee, her heirs and assigns forever, against the lawful claims and demands of all persons.

IN WITNESS WHEREOF, the said The Prudential Insurance Company of America, a New Jersey corporation, the grantor, has caused these presents to be subscribed and its corporate seal to be hereunto affixed by Franklin D'Olier, its Vice President, and E. J. MacIver, its Assistant Secretary, thereunto duly authorized by resolution of its Board of Directors, this 4th day of August, 1933.

Signed, sealed and delivered in the presence of:

(Seal) THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA

By: FRANKLIN D'OLIER,

Vice-President.

E. J. MACIVER,

Assistant Secretary.

JOHN KARL,

HARRY V. FISHER,

Attesting Witnesses.

STATE OF NEW JERSEY COUNTY OF ESSEX ss:

Before me, a Notary Public in and for said county and state, personally appeared The Prudential Insurance Company of America, by the above named Franklin D'Olier, its Vice President, and E. J. MacIver, its Assistant Secretary, respectively, who acknowledged the execution, signing and sealing of the above and foregoing instrument as and for the free and voluntary act and deed of said corporation, and they further acknowledge that the execution of said instrument is by virtue of authority of the Board of Directors of said corporation; and that the seal thereunto affixed is in truth and in fact the common corporate

seal of said corporation, and that it was likewise affixed by authority of the Board of Directors.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office, this 4th day of August 1933.

(Seal)

JOHN KARL,
Notary Public.

My commission expires February 10th, 1937.

Stamps \$281.00

Transferred August 19th, 1933.

Received August 19th, 1933 at 8:10 P. M.

Recorded August 21, 1933.

London, Ohio, Nov. 26, 1937.

I, Norman K. Jones, Recorder of Madison County, Ohio, do hereby certify that the foregoing copy is a correct transcript from the records of this office.

Given under my hand and seal at London, Ohio, this date.

NORMAN K. JONES,
Recorder of Madison County, Ohio.

AFFIDAVIT OF DAVIS HARRISON.

Davis Harrison, being duly sworn says:

1. That he has made a careful search in his files and in the files of The Prudential Insurance Company of America and he finds no answer to the letter of Richard Simkins addressed to The Prudential Insurance Company of America dated June 27, 1933 addressed to Mr. R. F. Little, and he likewise finds no answer to the letter of June 28, 1933, from Richard Simkins to Mr. R. F. Little;

2. That Exhibit One attached hereto is a true carbon copy of the answer of affiant to the letter written to him by Richard Simkins under date of May 15, 1933;

3. That Exhibit Two attached hereto is a true carbon copy of the letter written to Richard Simpkins on September 30, 1936, as to which affiant testified;

4. That Exhibit Three attached hereto is a true carbon copy of a letter written by affiant to Col. George Florence and about which affiant testified; that the originals of

each of Exhibits Two and Three were deposited in the United States Mails properly addressed with proper postage affixed and that neither original was returned to affiant;

5. That Exhibit #1 of June 30, 1937, has been amended in keeping with request of counsel and is attached hereto; that the sale price of the Madison County lands has been corrected from \$254,700.00 to the actual cash received which was \$249,106.00; that this reduction makes a corresponding reduction in other items in said Exhibit and that said Exhibit as now amended speaks the truth; that there has been added to said Exhibit at request of counsel for Crites Inc., a statement of the amount due on each farm as of July 1, 1933; that said amounts appear in the column designated "Judgment Costs to 7-1-33"; that said totals are arrived at by taking the judgments, adding thereto interest to July 1, 1933, and also adding thereto the other costs paid or accrued except direct selling expense; that based on the judgments, the profit made by the Prudential Insurance Company on the sale of these farms was \$1,843.23; that investment profit was \$4,025.63; that the difference is accounted for by difference of interest rate and the fact that in the investment profit the commissions paid on sales of Pickaway County farms are taken into account; that affiant's testimony and affidavit to the effect that investment profit of the Prudential was approximately \$9,000.00 was incorrect and that said error arose by reason of the fact that the original Exhibit #1 used the approved sale price of \$254,700.00 on the Madison County farms erroneously and should have used the actual sale price of \$249,106.00;

6. That affiant attaches hereto Exhibit A, Schedule One, which sets out a breakdown of the item of costs and fees on Exhibit #1;

7. That affiant attaches hereto Exhibit A, Schedule Two, which is an analysis of costs to Prudential as of July 1, 1933, based on the judgments, as hereinabove recited;

8. That The Prudential Insurance Company of America received no additional consideration for the crops which were growing on said farms or any of them at the time of the Marshal's sale but the sale price as set out on Ex-

hibit #1 was the price received by the Prudential for the respective farms including the growing crops;

9. That the fire loss payment of \$2,200.00 received from the Home Insurance Company on August 19, 1932, was applied by it on principal on October 5, 1932, on Loan #135887, which was property #16629, covering what is known as the Hilter Farm of 611 acres; that said credit appears in Exhibit #1 but was not taken into account in the judgment; that said error evidently occurred because counsel at the time received no memorandum of this credit and assumed that the principal balance at the time of judgment remained the same as at the time the suits were filed;

10. That the Prudential Insurance Company paid no commissions to any person on account of the sale of the Madison County farms;

11. That there was no "breakdown" of the consideration received from the sale of the Madison County farms, that those farms for the purpose of profit and loss are carried as one item and the consideration received was applied in the same manner;

12. That affiant was unable to produce a copy of the release to May R. Crites; that the only release of which affiant has any recollection is a release executed by him as attorney of record which was mailed to Columbus on October 3, 1933 and that affiant has no knowledge concerning the same.

Affiant further says that this affidavit, together with the Exhibits attached thereto, is furnished and submitted under the objections previously made to its admissibility and the admissibility of the various exhibits, and subject further to motion of the Prudential Insurance Company to strike out the same.

Further affiant saith not.

DAVIS HARRISON

Subscribed and sworn to before the undersigned Notary Public this 3d day of July, 1937.

CLAUDE H. ANDERSON.

Notary Public.

My Commission expires:

Feb. 15, 1938

May 17, 1933.

In re: Prudential vs. Crites
Richard Simkins
Attorney
Circleville, Ohio

Dear Dick:

I have not computed the various amounts to July 1st, but it would be simply a matter of adding interest at 8 per cent. on each of the judgments from May 2nd to July 1st—a matter of two months. It will simply be a matter of 1-1/3 per cent. in the total in each case.

Please have the auditors figure the taxes to July 1st on these farms. In case there are bidders, you will buy in the separate tracts.

Keep me advised.

Very truly yours,
REMY, HARRISON & REMY
By

DH:LC

September 30, 1936

Richard Simpkins,
Attorney-at-law,
Circleville, Ohio

In re: Crites matter

Dear Dick:

You no doubt know that Ingalls & Selby, apparently acting for George Florence, have filed an application for an order directed to the Prudential Insurance Company to show cause why it should not be punished for contempt for withholding the final report of the receivers. It strikes me that such a proceeding is rather indelicate coming from one of the attorneys for the Prudential in the foreclosure suits. However, that is a matter which I can not control.

It has been my hope that this matter might be adjusted and these reports approved. However, I have just recently been advised that the Prudential Audit-

ing Department has called attention to the fact that the items claimed for expenses appear quite excessive and likewise have no vouchers to support them.

Of course I explained that in my opinion a division of these expense items among the various cases was not only unnecessary but from a practical standpoint impossible. The feeling of the Company, however, is that the lump sum of expenditures is out of all proportion to the services and to the funds in the trust. I assume that I shall have no other choice but to file exceptions and ask for proof on the matter of the expense items.

The matter of fees was entirely satisfactory but the objection is only to the items mentioned.

It is a matter of a good deal of embarrassment to me that this situation has arisen but having arisen, we shall all have to meet it as best we can. If you feel that your charges for expenses might be reduced even though slightly I think no exceptions would be filed and the reports could be approved.

While I have nothing definite on the matter, it has been intimated to me that Crites Inc. would likewise file exception to the report but on what grounds I do not know. If I learn any details, I shall be glad to advise you.

Please give this matter some careful consideration. Let me hear from you.

Yours very truly,

dh/ms

September 30, 1936

Colonel George Florence,
43 Jefferson Avenue
Columbus, Ohio

In re: Crites matter

Dear Colonel:

It was with regret that I learned of the action taken by Ingalls & Selby on your behalf.

The Prudential has not indicated its approval of the final report because of the report of its auditors to the effect that they question the accounts claimed

for expenses in the absence of vouchers supporting the same. I have been hoping that the approval could be obtained and that it would not be necessary to file exceptions to the final report. However, this action probably defeats my purpose along that line.

I have written Dick Simkins today along the same line and have stated to him what I now state to you that if the claim for expenses can be reduced even though slightly, I feel that the Prudential will make no exceptions to the final report.

I repeat to you what I said to Dick, that I have had some intimation to the effect that Crites Inc. will file an exception. I do not know the grounds or anything more, in fact it may be only a rumor. If I learn any details, I shall be glad to advise you.

I would be glad to have you talk this over and let me hear from you at your earliest convenience.

Yours very truly,

EXHIBIT A
SCHEDULE ITHE PRUDENTIAL INSURANCE CO.
INDIANA BRANCH MORTGAGE LOAN DEPARTMENTPrepared 7-1-37 by CLARENCE L. BAKER, Auditor
Indiana Br. Office.SCHEDULE OF "COSTS AND FEES" ADVANCED IN CONNECTION WITH ACQUISITION OF THE CRITES PROPERTIES
(ALL SELLING EXPENSES EXCLUDED)

PROP. #	TOTAL FEES & COST APPLICABLE TO BOOK COST	ATTY. FEES	FORECLOSURE EXPENSES	1931 Yr. 1932 Yr. & 1st 1/2 1933 TAXES	INSURANCE	RECORDING & TRANSFERRING DEED	TITLE POLICIES	MARSHALL'S COST	PRO-RATED CONFERENCE TRIPS	ABSTRACT CHARGES
16,307	1,066.45	185.00	108.03	622.79	6.53	2.14	55.70	85.00	1.26	
16,308	1,112.58	210.00	148.77	640.30	10.55		55.70	45.00	2.26	
16,309	1,282.40	210.00	149.06	800.18	20.20		55.70	45.00	2.26	
16,310	1,525.53	235.00	109.56	1,028.42	9.59		55.70	85.00	2.26	
16,311	1,382.73	232.50	109.66	892.67	4.94		55.70	85.00	2.26	
16,312	1,103.25	190.00	109.67	655.70	4.92		55.70	85.00	2.26	
16,313	826.89	155.00	109.27	417.85	1.80		55.71	85.00	2.26	
16,314	1,934.52	275.00	107.67	1,392.57	14.31	2.00	55.71	85.00	2.26	
16,315	1,116.84	205.00	107.53	656.52	2.79	2.03	55.71	85.00	2.26	
16,316	1,796.93	255.00	109.43	1,274.36	15.03	.14	55.71	85.00	2.26	
16,317	2,758.09	360.00	107.53	2,114.78	30.67	2.14	55.71	85.00	2.26	
TOTAL	15,906.21	2,512.50	1,276.18	10,496.14	121.33	8.45	612.75	855.00	23.86	
16,624	1,572.09	245.00	122.54	1,098.34	55.74	1.10		40.00	1.13	8.04
16,625	1,260.21	225.00	119.54	834.35	29.79	1.10		40.00	2.39	8.04
16,626	825.06	145.00	122.06	494.13	4.72	1.35		40.00	9.91	8.04
16,627	1,099.77	255.00	119.04	646.82	27.38	1.90		40.00	2.39	8.04
TOTAL	4,757.13	870.00	483.18	3,073.64	117.63	4.70		160.00	15.82	32.16
16,628	1,055.40	240.00	87.89	543.38	23.27	2.90	117.50	40.00	1.26	
16,629	2,175.70	340.00	162.81	1,466.56	154.93	2.90		40.00	1.26	8.04
16,630	829.91	250.00	87.17	422.28	21.96	1.90		40.00	1.26	8.04
16,631	1,299.84	270.00	188.00	785.56	4.87	2.90		40.00	1.27	8.04
16,848	958.01	195.00	136.67	552.84	22.89	1.30		40.00	1.27	8.04
16,849	1,163.60	270.00	115.38	715.44	12.38	1.10		40.00	1.26	8.04
18,055	1,456.94	270.00	66.57	1,069.20		1.80		40.00	1.26	8.11
TOTAL	8,939.40	1,835.00	844.49	5,553.26	240.30	11.70	117.50	280.00	8.84	48.31
GRAND TOTAL	29,602.74	5,217.50	2,603.85	19,123.04	479.26	24.85	730.25	1,295.00	48.52	80.47

OBJECTIONS AND EXCEPTIONS OF THE DEFENDANT CRITES, INC., TO THE FINDINGS OF FACT AND TO THE REPORT OF GAIL H. BUTT, ESQ., SPECIAL MASTER.

(Filed March 13, 1939.)

And now comes the defendant, Crites, Inc., and objects and excepts to the findings of fact and to the report of Gail H. Butt, Esq., Special Master in Chancery, heretofore filed in this cause in the following particulars:

AS TO FINDINGS OF FACT

1. It objects to the finding that the circumstances of this case do not show that said receivers were guilty of any culpable neglect in the regard alleged in exceptions 1 and 2 nor that said receivers were unduly neglectful. The Special Master should have found that the defendant, Crites, Inc., was not notified of the lodging of these receivers' reports with Judge Hough or of the meeting in April or May 1934 with Judge Hough in his chambers and was not present thereat; that the first information Crites, Inc., had of the content of the receivers' reports and accounts was when the hearing thereon was first had before this court on June 2, 1937; that the Prudential Insurance Company through its attorney, Davis Harrison, knew that Crites, Inc., was interested in ascertaining the content of the receivers' reports; that the reports would serve as a basis for compensation to the receivers and to their counsel; that the reports did not show any fees, emoluments or compensation received from Jones, Proctor, Ingalls or anybody else; that the reports did not show fees paid to Harrison by Simkins; that all the fees received by Simkins and Harrison arose out of this trust in connection with the sale of the property involved therein; that knowledge of the payment of these fees was withheld from the co-receiver, Mr. Florence, as well as the court; that said reports do not show the advancements and accounts with each of the tenants so as to show any balance owing on the final status of the account with each tenant; that no

effort was made within a reasonable time by regular or proper procedure to have the reports lodged with Judge Hough filed and approved; that the dispute between the Prudential Insurance Company and the receivers was that the auditors of the Prudential Insurance Company who checked over those accounts found that the receivers had charged as expenses, not as fees but as expenses, about \$6500 in receivers' expenses, and the Prudential Life Insurance Company did not feel that those expenses were justified (R. 172); that Mr. Harrison wrote to the receivers that he thought their charges for expenses were too high and they should make some reduction in what they claimed in credits or expenses, and if that was done, no exception would be filed (R. 172); that the dispute was sufficient to prevent them from arriving at an agreement and from filing the accounts for some three years; that, notwithstanding, the Prudential Insurance Company had received the full amount of its loan and other sums payable to it on the Madison County Farms because of the Jones and Proctor transaction and perhaps with others; that they permitted the court to believe, and imposed on the court in misleading the court to believe, that there was a bona fide deficiency; that the receivers were derelict in their duties in not filing any report and having a hearing thereon within a reasonable time.

2. It objects to the finding that during the term of said receivership the receivers were in charge of the leasing and operation of 22 farms during a period when such operation was extremely difficult. The Special Master should have found that the receivership was during a difficult period in farming history; and that there is no evidence that the receivers had any difficulty with the Prudential Insurance Company, Crites, Inc., or with any of the tenants in the course of their operations; and that no charge was made for the use of the machinery on the farm.

3. It objects to the finding that the credits claimed and objected to by the third exception were never formally allowed by Judge Hough by any written order, but were informally and orally authorized by him. The Special Master should have found that Judge Hough did not pass upon the receivers' reports lodged with him; that his oral

direction was with respect to the receivers' transportation expenses and incidental luncheon expenses while traveling and was made in the second or third month of the receivership; that there is no showing in the record of the facts or matters presented to him on which such direction was based; that no petitions were presented by the receivers or anyone to Judge Hough therefor, nor any notice given to Crites, Inc., thereof or of any application to Judge Hough or this court, nor any notice given of any such direction until the hearings before this court on the said receivers' accounts filed February 19, 1937.

4. It objects to the finding that such informal allowance is entitled to considerable weight. The Special Master should have found that it is not entitled to weight, that there is no showing that Judge Hough was apprized of all the facts, or of the compensation received by the receivers and their attorneys from all sources or of their agreements among themselves, that the direction if any, was made *ex parte*, and that the Prudential Insurance Company objected to the receivers that their charges for expenses were excessive.

5. It objects to the findings that the charges objected to in the third exception are reasonable and have been fairly apportioned among the various farms and that no duplications are apparent and that no such charge had been made against any particular farm without due cause therefor. The Special Master should have found that the basis of the apportionment was not proved, or that any reason for apportionment was proved, that the foreclosures being separate foreclosure suits, the charges should have been segregated to each farm, that there is no evidence that each and all of the charges so allowed was a reasonable charge or what a reasonable charge was, that the burden of proof as to the necessity and reasonableness of the charges was upon the receivers, and that the cancelled checks of the receivers show payment of \$650 to the law firm of Abernethy & Simkins and there is no evidence that Abernethy & Simkins paid all or any part of the expenses for which credit is taken, nor that there was any obligation owing to Abernethy & Simkins, nor the nature of the obligation if any for which this was paid; and that

the mileage traveled by, and the incidental luncheon expenses of, each of the receivers are a matter of record and in evidence in the Receivers' Exhibit C, and that a reasonable allowance based on mileage and for the actual expenditures so recorded could have been determined.

6. It objects to the findings that the expenses claimed by the receivers and objected to by exception 4 to the receivers' report are not excessive, improper or duplicated and that the charges are proper and allowable herein. The Special Master should have found the facts to be as stated in the previous objection and in the objections hereinafter contained.

7. It objects to the finding that under the circumstances no neglect on the part of the receivers with respect to the vouchers and receipts has been shown and to the finding that the receivers have done all in this respect that could be rightfully required of them. The Special Master should have found that rightfully the receivers should have filed their accounts and supporting vouchers with the clerk of this court as part of these proceedings and that notice should have been served upon all the parties within a reasonable time thereafter for a hearing thereon, and that the same should not have been merely delivered to the judge in chambers and left with him indefinitely only to be lost.

8. It objects to the finding of fact that while the records kept by the receivers were neither the best nor the most complete that might have been kept, taken in connection with the evidence intelligent reports can be made therefrom. The Special Master should have found that no complete records were kept and no intelligent complete reports were filed.

9. It objects to the findings that a separate and detailed allocation of expenses among the various farms has been made upon a reasonable basis in so far as can reasonably be required. The Special Master should have found that the basis of allocation to the respective farms was not proved and no basis justified.

10. It objects to the finding that considering the matter as a whole, the allowance claimed for clerical expenses is reasonable and proper. The Special Master should have

found that included in the credits claimed for such expense was a total of \$650 paid to the law firm of Abernethy & Simkins, of which the receiver Simkins was a member, that there is no evidence that Abernethy & Simkins paid all or any part of the expenses for which such credit is taken, nor that there was any obligation owing to Abernethy & Simkins, nor the nature of the obligation, if any, for which this was paid.

11. It objects to the finding that no credits are claimed for clerical expenses after the necessity for such service had ceased.

12. It objects to the finding that there was an agreement between O. C. Ingalls, attorney for the receivers and receiver Simkins for the "equalization" of fees received by them in this case. The Special Master should have found that the agreement between them was one to divide or pool between them any fees received in or arising out of these cases.

13. It objects to the finding that the sum paid by Mr. Ingalls to Mr. Simkins for money received by Mr. Ingalls as attorneys for the complainant was paid pursuant to an agreement for the "equalization" of fees received by them in these cases. The Special Master should have found that such sums were paid pursuant to their agreement to divide or pool between them any fee received in or arising out of these cases.

14. It objects to the finding that receiver Simkins prior to the sale and while acting as receiver entered into an agreement with E. F. Jones of Washington C. H., Ohio whereby he agreed to assist Mr. Jones in securing title to the 11 farms belonging to the estate and located in Madison County Ohio, after such title should be secured by the Prudential Insurance Company. The Special Master should have found that the receiver Simkins did, prior to the foreclosure sales and while acting as receiver, enter into an agreement in writing with E. F. Jones of Washington C. H., Ohio, wherein and whereby he employed the said Simkins to represent him in connection with the purchase of the Madison County Farms that were in foreclosure, to help him acquire the 11 farms located in Madison County, Ohio, involved in these foreclosure suits and to

render any other service in the way of legal work, and wherein and whereby he was to pay Simkins a compensation only if he, Jones, secured the farms, and was not to pay Simkins anything at all, if he did not secure the farms; that said agreement was never produced in court by either the said Simkins or the said Jones, although its production was requested; that said Simkins accepted such employment; and that said agreement was not limited to assisting Jones in securing title to said farms after title should be secured by the Prudential Insurance Company.

15. It objects to the finding that Mr. Simkins pursuant to the agreement as set forth in the Special Master's finding was active in negotiating the sale of said farms by the Prudential Insurance Company. The Special Master should have found that Mr. Simkins while acting as co-receiver, was active before and after the marshal's sales in negotiating the purchase of said farms pursuant to the agreement as set forth in the previous objection.

16. It objects to the finding that any influence possessed by Mr. Simkins and sought to be purchased by Mr. Jones was influence with the Prudential Insurance Company and not influence as a receiver. The Special Master should have found the facts and the agreement as above set forth in objection No. 14.

17. It objects to the finding that Crites, Inc., although a defendant, did nothing to change the belief of Judge Hough, that the Prudential Insurance Company was the only party concerned by the conduct of the receivers, at a time when it could have been helpful to the court. The Special Master should have found that the hearings before Judge Hough, after the confirmation of the sale, in connection with the receivers' reports were all held in Judge Hough's chambers in the absence of the defendant, Crites, Inc., and without notice to the defendant, Crites, Inc., that the interest of Crites, Inc., as owner of the equity of redemption was disclosed in the plaintiff's pleadings, thereby requiring no answer to set it forth, that the foreclosure sales were all (with the exception of a few farms in Pick-away County) at prices slightly in excess of two-thirds of the appraised value, the minimum price allowed by the decrees of sale; that the facts of the Proctor and Jones

transaction and the part taken therein by the said Simkins, his agreement with the said Jones and the knowledge on the part of the Prudential Insurance Company of Simkins' role were not revealed to the defendant, Crites, Inc., or known by the defendant, Crites, Inc., or this court until the hearings on the receivers' accounts before this court and the Special Master, and were never revealed to or known by Judge Hough; that Crites, Inc., had no knowledge of any irregularities, that the irregularities were not disclosed in the receivers' reports, that such disclosure was thus made many years after the foreclosure sales and the confirmation thereof and after the informal hearing in Judge Hough's chambers in April or May 1934, and that Crites, Inc., had then no knowledge of any facts to submit to the court which could change any belief at that time held by the court.

18. It objects to the finding that the Proctor interests were not prospective buyers at the marshal's sale because of the fact that they demanded a warranty deed supported by the Prudential Insurance Company and for the whole tract. The Special Master should have found that Jones had authority from Proctor to purchase the Madison County farms, that Jones' authority to purchase was not limited to purchasing from the Prudential Insurance Company or limited to obtaining a warranty deed supported only by the Prudential Insurance Company, that Jones had previously tried to purchase the farms from H. M. Crites at private sale for a price of approximately \$500,000, that the receiver Simkins had made inquiry whether said farms could be purchased as a whole in the judicial sales, and that title guaranty policies were required by Mr. Proctor and were obtained.

19. It objects to the finding that there is no substantial evidence to support an inference of controlled bidding or illegal conspiracy with reference thereto, for that the same is contrary to the evidence in the record. The Special Master should have found the facts as corrected by the objections herein.

20. It objects to any finding that in view of the attitude of Col. Proctor as shown by the record it does not appear that he was in any sense of the word a prospect who

might have bought at the sale or that he would have been interested in buying the land from Crites, Inc., for that the same is contrary to, and not supported by, the evidence.

21. It objects to the failure of the Special Master to find that at the time of the commencement of the actions to foreclose the mortgages therein; the equity of redemption in and to each parcel of real estate encumbered by said mortgages was owed and vested in the defendant, Crites, Inc., an Ohio corporation, which prior thereto had been organized for the purpose of acquiring the assets of Henry M. Crites and administering the same for the benefit of his many creditors which facts were known to the Prudential Insurance Company, to the receivers and to their attorneys.

22. It objects to the failure of the Special Master to find that the real estate encumbered by the mortgage liens sought to be foreclosed in cases numbered 927, 928, 929, 930, 931, 933, 934, 935, 936, 937, and 947 is situated in Madison County, Ohio and consists of eleven separate contiguous farms. The real estate encumbered by the mortgage liens sought to be foreclosed in cases numbered 932, 938, 939, 940, 941, 942, 943, 944, 945, 946 and 948 is situated in Pickaway County, Ohio and consists of eleven separate farms.

23. It objects to the failure of the Special Master to find that by the terms of the mortgages in each case, each mortgage secured the respective debts therein described and did not secure any deficiency in any of the other debts of Henry M. Crites and/or May R. Crites to the plaintiff.

24. It objects to the failure of the Special Master to find that Judge Hough in 1932 continued the operations of the farms for another year, and that he thought times would be better and the farms would sell better.

25. It objects to the failure of the Special Master to find that all the wheat grown on the farms had been threshed and harvested by July 1933, that the corn on the farms was disposed of by the receivers as a standing growing crop in September 1933, and that the last remaining wheat which they held was disposed of in April 1934.

26. It objects to the failure of the Special Master to find that some time prior to July 1, 1933, one Edwin F.

Jones, a real estate dealer in Washington Court House, Ohio, was employed by one William Proctor to purchase for him, or his nominee, the real estate in Madison County, Ohio; and described in the petitions in cases numbered 927 to 931, both inclusive, 933 to 937, both inclusive, and No. 947, for which the said Proctor agreed to pay the sum of \$281,000 with the understanding that the said Jones as and for his compensation would retain the difference between \$281,000 and any lesser sum for which he might be able to acquire said real estate.

27. It objects to the failure of the Special Master to find that thereafter, the said Jones conferred with said Simkins, one of the co-receivers herein, telling him that he wanted Simkins to intercede for him and would pay Simkins compensation. They entered into an agreement in writing that Jones was to pay Simkins for services in helping Jones acquire the aforesaid Madison County farms and any other services in the way of legal work, which compensation was conditioned upon Jones' securing the said farms; and, if Jones did not secure the farms, he was not obligated to pay Simkins anything, which agreement they failed to produce although requested.

28. It objects to the failure of the Special Master to find that Jones himself had at an earlier time tried to effect a purchase of these very Madison County farms for approximately \$500,000 in behalf of J. C. Penny of New York, from Mr. Crites, and his offer had been rejected.

29. It objects to the failure of the Special Master to find that prior to the foreclosure sale the said Simkins, Jones and agents of the Prudential Insurance Company of America met at various places, including the Neil House in Columbus, Ohio, and agreed upon terms to be embodied in a form of agreement to be executed by the said Jones and the said Prudential Insurance Company. During such negotiations the said Simkins acted as counsel for the said Edwin F. Jones, the purchaser; and the Prudential Insurance Company knew that Simkins was representing Jones and receiving compensation from Jones, and, for that reason, were not paying Simkins for disposing of the Madison County farms, although he did represent them in the sale of all but three of the Pickaway County farms.

30. It objects to the failure of the Special Master to find that on the 27th day of June 1933 Simkins received from the said Jones the certain instrument in writing bearing said date, a copy thereof having been introduced in evidence, which instrument was then signed by the said Jones and witnessed by the said Simkins and Marion R. Lutz. The said Simkins did on June 27, 1933, pursuant to an arrangement with the plaintiff for the sale of said properties, send the said instrument in writing to the plaintiff. The said Jones did prior to the said foreclosure sale deliver to the plaintiff his personal check in the sum of \$3,000 payable to the plaintiff's order and duly certified.

31. It objects to the failure of the Special Master to find that the foreclosure sales were held in London, Ohio, on the first day of July, 1933, and were attended by Davis Harrison, attorney of record for both the plaintiff and the receivers. Jones also attended the said sale, but relying on his said agreement with the Prudential Insurance Company, did not bid thereat.

32. It objects to the failure of the Special Master to find that the Prudential Insurance Company through said Harrison bid in the said respective parcels of real estate in Madison County at slightly in excess of two-thirds of the appraised value of the said real estate, being a minimum, its total bid for all of the said Madison County real estate being in the sum of \$164,000.00. The appraised values in five of said cases, to-wit, 927, 929, 931, 934, and 937, exceeded the amount of the judgments in favor of the plaintiff and the amount of taxes (as later ascertained and paid by the receivers) by \$14,311.72.

33. It objects to the failure of the Special Master to find that the Prudential Insurance Company took a deficiency judgment against Henry M. Crites aggregating in the said 11 cases the sum of \$64,617.95. Although paid in full on all of the loans and expenses secured by the said Madison County farms, the Prudential Insurance Company thereafter even continued to assert a claim against Crites, Inc., on this deficiency with a view to obtaining some payment on account thereof and as an additional profit to it.

34. It objects to the failure of the Special Master to find that subsequently, on to-wit, on or about the 18th day

of August, 1933, the Prudential Insurance Company pursuant to its aforesaid agreement with said Edwin F. Jones made and delivered its certain deed conveying all of said Madison County real estate to Mary E. Johnston, a certified copy of which deed is in evidence. The said deed recites a consideration of \$249,106 and had affixed thereto United States documentary revenue stamps in the amount of \$281,000 indicating a consideration of \$281,000. The conveyance to Mary E. Johnston was made at the direction of William Proctor, and the consideration therefor was paid by William Proctor. The said William Proctor paid to Edwin F. Jones the difference between the sum of \$249,106, which he paid to the Prudential Insurance Company, and \$281,000, namely \$31,894, as and for his commission.

35. It objects to the failure of the Special Master to find that said William Proctor made out two checks to Jones one for \$15,000 and the other for an amount which Jones didn't remember. He didn't remember whether the second check was for \$10,000 or approximately \$10,000 or less.

36. It objects to the failure of the Special Master to find that the numbers of the causes involving the real estate in Madison County, Ohio, the acreage, the amounts of the mortgage principal, the amounts of the judgments, the amounts of the appraisals of the real estate in each, the amounts of the bids at the marshal's sales and the deficiency judgments entered therein are as set forth in the table attached to the exceptions of this defendant to the accounts of said receivers.

37. It objects to the failure of the Special Master to find that the total amount of the judgments to pay which the said Madison County farms were sold was \$224,742.32. The difference between that and \$281,000 is \$56,257.68, which amount is the equity in the said properties lost to Crites, Inc., as well as the equities in the Pickaway County farms which would otherwise have been redeemed.

38. It objects to the failure of the Special Master to find that Simkins received from Jones, as compensation in connection with the purchase of the Madison County farms as aforesaid, a total of \$2,797.00 (less not to exceed \$200

to cover other items) paid as follows: \$500 on July 3, 1933, \$1,000 on July 8, 1933 and \$1297.00 on August 18, 1933 which last payment by Jones to Simkins was out of the very moneys that Jones had received from said Proctor as compensation and on the very date that the said Proctor's attorney received the deed for the said property. Of this last check Simkins paid \$500 to Mr. Harrison on a Neil House "guest check blank" dated August 18, 1933, which cleared August 29, 1933.

39. It objects to the failure of the Special Master to find that the agreement between Jones and the plaintiff made prior to the foreclosure sale and negotiated through the said Simkins in behalf of said Jones had the effect of stifling and did stifle bidding at the foreclosure sale.

40. It objects to the failure of the Special Master to find that referring to all the real estate in all 22 foreclosure cases, the said Ingalls in his petition and in supporting statements attached thereto said:

"It was sold to the Prudential Insurance Company, no one else having a chance, for \$308,000, plus, and the Prudential Insurance Company a few months thereafter sold all the farms for an amount which enabled them to get approximately \$200,000 profit, so the Prudential Insurance Company should not be permitted to complain concerning fees asked, and they should be compelled to pay into this estate an additional sum of money so that a fee commensurate with the services rendered could be asked by both counsel and the receivers."

"The farms were sold at public auction to the Prudential Insurance Company for \$308,000 on the 1st day of July, 1933, and within a few months after the sale the Prudential sold these farms for showing the tremendous profit to the Prudential Insurance Company. The tremendous size of these farms and the fact that the Prudential Insurance Company did insist upon buying all of them, kept away a great many bidders who were interested in buying these farms."

41. It objects to the failure of the Special Master to find that at no time prior to the hearings on this reference was there ever communicated to the court in any manner the information concerning Mr. Simkins' interest in the sale of said properties to Jones, acting for and in behalf of said William Proctor, or of his participation in the negotiations leading thereto or of his employment in connection therewith or of his contract for his compensation contingent upon the purchase by Jones acting as aforesaid.

42. It objects to the failure of the Special Master to find that Harrison and Simkins also had an understanding that if Simkins collected substantial fees out of the sales of any of the farms that Simkins would take care of Harrison.

43. It objects to the failure of the Special Master to find that the first information to Crites, Inc., of the hearings to be held on the receivers' accounts or of the filing thereof was a letter dated May 25, 1937, from Mr. Harrison to Mr. Haffenberg in which Mr. Harrison wrote:

"I am giving you this information because you had indicated that perhaps Crites, Inc., would want to be present at this hearing to be heard in Federal Court, Columbus Ohio, at 10 A.M. Eastern Standard Time on June 2nd."

44. It objects to the failure of the Special Master to find that Simkins was fully aware that Crites, Inc., under the supervision of a committee of the creditors of Henry M. Crites was then acting to realize out of Mr. Crites' assets whatever could be salvaged in order to reduce the losses to his creditors. The creditors' committee and Crites, Inc., cooperated in every manner and extended every assistance to both the receivers and the Prudential Insurance Company, and permitted the use, without charge, of extensive farm equipment so as not to interrupt the proper operation of the farms. And it was known to both Simkins and the Prudential Insurance Company that Mr. Harlor and the creditors' committee were trying to secure purchasers for the Madison County farms in order for Crites, Inc., to be able to hold on to the Pickaway County farms.

45. It objects to the failure of the Special Master to find that at the time the foreclosures were instituted the principal indebtedness had not become due by lapse of time, and the defaults for which the maturities were accelerated were not serious.

46. It objects to the failure of the Special Master to find that Mr. Simkins has taken credit in his said account for the sum of \$250 as fees pursuant to an order of court entered ex parte and without notice to Crites, Inc. In addition to said fee the said Simkins has paid to himself as fees and taken credit therefor, the sum of \$1800.00. No order relative thereto was ever journalized or made any matter of record. In addition to said fees, said Simkins has taken credit at the rate of \$100 per month as an allowance for mileage, transportation and incidental luncheon expenses. No order of court relative thereto was ever journalized or made a matter of record. A record of Simkins' mileage is set forth in the receivers' Exhibit C. A reference to his mileage in said Exhibit C will disclose that \$100 per month would be an excessive allowance and far more than what would be a reasonable allowance for such expenses to him throughout the period in which he was actively engaged about the farms, namely, from February 17, 1932 to October 1933. A reasonable allowance for such mileage, transportation and incidental luncheon expenses is capable of ascertainment by reference to said Exhibit C, and a re-reference should be made therefor.

47. It objects to the failure of the Special Master to find that in addition thereto his law firm, Abernathy & Simkins was paid the sum of \$650.00. In addition thereto a total of \$3,093.70 was paid out of receivership funds to Mr. Simkins, which amount has not been justified by him.

48. It objects to the failure of the Special Master to find that the receivers' account filed in cause number 944 among other entries, recites as follows, "Said receivers credit themselves as follows: Credit on loan of The Prudential Insurance Company, \$656.25." There is no evidence that any loan was made to the receivers chargeable to operations on this farm and the entry is incorrect.

49. It objects to the failure of the Special Master to find that the account of the receivers in connection with the

same case shows that the receivers charge themselves, "By amount of loan from The City National Bank of Columbus, Ohio, on receivers' certificate, \$150.00." Under date of April 16, 1934, the receivers credit themselves with the payment of receivers' certificates to The City National Bank and Trust Company of the sum of \$200.00. Pursuant to court order, the receivers borrowed from The City National Bank and Trust Company the sum of \$7,500.00 as evidenced by their certificates, and under the order of the Court, the sum was to be apportioned among the equity cases by the receivers, \$150 thereof was apportioned to cause No. 944.

50. It objects to the failure of the Special Master to find that in cause number 945 in the paper entitled "First and Final Account, on account of George Florence and Richard Simkins, Receivers", among other entries under what the receivers charge themselves with is the following: "By sale of corn, one-half of 200 acres sweet corn, at 35¢—\$1,468.75." A subsequent entry under date of October 7, 1933, under what the receivers credit themselves with is the item, "Credit on loan of the Prudential Insurance Company of America, \$1,468.75." The account fails to disclose that any such loan was ever made by The Prudential Insurance Company to the receivers other than a loan of \$89.00 advanced for the payment of insurance premiums. The entry is obviously erroneous.

51. It objects to the failure of the Special Master to find that in the journal kept by said receivers in cause number 946, appears the following item: "August 1, 1932, Home Insurance Company, New York, for loss of barn, Farm Number 6, \$2,200.00." This entry is crossed out, and there is appended thereto the legend, "Payment stopped on check". The entry referred to the farm in Cause Number 945. The barn on the farm in said cause Number 945, known as the Hitler farm, burned during July of 1932. The receivers having at the cost of the estate effected insurance upon the building made demand upon the Home Insurance Company for payment of the loss. Accordingly the check was issued to the receivers as recited in the journal, but before the same was accepted by the drawee, payment thereof was stopped by the drawer

and another check subsequently issued to the plaintiff, The Prudential Insurance Company of America, under date of August 19, 1932, the proceeds of which were on October 5, 1932 by the Company applied on account of the principal due it on the mortgage note which it held, but which credit was never called to the attention of the court and judgment was subsequently entered in Cause Number 945 against the makers of said note in favor of the plaintiff, without any credit by reason of said payment being allowed.

AS TO CONCLUSIONS OF LAW

1. It objects to the conclusion of law that the failure to specify the years for which taxes were paid is not fatal to the accounts in the absence of any showing of improper payment. The Special Master should have concluded that the burden of proof to show the propriety of the disbursements made for taxes was upon the receivers and to show that the payments thereof were in conformity with the authority granted to pay the taxes.

2. It objects to the conclusion of law that under the circumstances disclosed by the record it is not absolutely essential that the said facts set forth in the Special Master's findings of fact with respect to exception 9 should be revealed or set forth in the accounts of the receivers herein.

3. It objects to the conclusions of law that the receiver Simkins in the circumstances shown by the record had no control over the sale held by the United States Marshal, and that the receiver Simkins by the Prudential transaction derived no profit from the subject matter of the trust, that by the agreement with Mr. Jones the receiver Simkins did not occupy a position in which he represented conflicting interests, and that under the circumstances the receiver Simkins' conduct constitutes no violation of his trust which would justify action by this court in the manner requested in the 10th exception.

4. It objects to the conclusion of law that the receiver Simkins has been guilty of no breach of conduct and trust herein which would bar him from claim or allowance of reasonable compensation for his services as such receiver.

5. It objects to the conclusion of law that exceptions to allowances of credits for compensation paid by the receivers to their attorneys under an order of Judge Hough dated January 17, 1933 cannot be sustained at this time.

6. It objects to the conclusion of law that the receiver Simkins had been guilty of no misconduct which would justify the relief requested by the defendant in exception 13.

7. It objects to the conclusion of law "that the facts of record do not furnish any sufficient legal basis for surcharge against the receivers, nor do they require denial of compensation to the receivers."

8. It objects to each and every the recommendations made in said report of the Special Master to the extent that they recommend the overruling of the exceptions of this defendant.

9. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that the said Simkins as such receiver and officer of the Court stood in a fiduciary relation to Crites, Inc., and to the plaintiff; and in such fiduciary capacity he was prohibited without prior full and complete disclosure to the Court and all parties concerned, including Crites, Inc., and without their prior consent from engaging in any employment in which his personal interests or those of his employer would or might conflict with the interests of any of the parties to said litigation or from making any personal profit out of his trust.

10. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that the omissions, acts, and doings of said Simkins aforesaid constituted a breach of his fiduciary obligations as receiver herein, are against public policy, and require that he not be awarded any compensation as receiver herein and that he be surcharged as herein after stated.

11. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that the said Simkins, being a party to the transaction in behalf of Jones (who was acting in Proctor's behalf) and an active participant in it, and having

been employed with the purpose of concluding such transaction in Jones' behalf, and knowing Jones was to profit thereby, is also liable (as a result of his breach of his fiduciary obligation) for the profits accruing to Jones from such transaction, and for the ensuing loss of its equity in said Madison County farms to Crites, Inc.

12. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that the agreement between said Simkins, Ingalls and Harrison for the pooling and division of all fees to be received by them in connection with said foreclosure suits, including fees received by them as attorneys for the plaintiff, attorneys for the receivers and as receiver, and the division of such fees between them, pursuant thereto, is against public policy, illegal and void; and no fees to the receiver Simkins is allowable and no fees to Mr. Ingalls or Mr. Harrison as attorneys for the receivers are allowable, and no credit therefor allowable on the receivers' accounts.

13. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that the amount of the expenses for automobile transportation and incidental luncheons credit for which was taken in the said receivers' accounts is excessive and unreasonable; that the Special Master could have and should have fixed and determined the reasonable amount thereof on a mileage basis as per the mileage disclosed in said receivers' Exhibit C, and should have fixed and determined the amount of the incidental luncheon expenses at the amounts disclosed in said receivers' Exhibit C, and should have disallowed the \$100 monthly credit taken by each of the receivers to the extent that the same was in excess of such determination.

14. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that the orders of court heretofore entered in said causes with respect to fees and expenses were entered *ex parte* and without notice to Crites, Inc., and the said fees and expenses are therefore still the subject of consideration by the court in passing upon the receivers' said accounts. Weight cannot be given to the unofficial, un-

recorded, *ex parte* oral direction by Judge Hough for any monthly allowance for automobile, transportation and incidental luncheons, inasmuch as the same is reputed to have been made within the first few months of the receivership, and the basis therefor as presented to Judge Hough is not in evidence here.

15. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that in cause number 944 credit is not allowable for the payment of the sum of \$656.25 to the Prudential Insurance Company of America, and the same should be accounted for with interest until such time as said moneys were repaid to said receivers.

16. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that in cause number 944, credit for repayment of loan to the City National Bank and Trust Company of Columbus, Ohio, should be allowed in the sum of \$150 and not \$200 and the \$50 difference should be accounted for by said receivers.

17. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that in cause number 945, credit for repayment of loan to Prudential Insurance Company of America should be allowed in the sum of \$89 and not for \$1468.75, and the difference of \$1379.75 should be accounted for with interest until such time as such moneys were repaid to said receivers.

18. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that said Simkins should be surcharged with the following items and amounts and ordered to pay the same into court for distribution as the court may hereafter direct:

- (a) the sum of \$250 paid to him as fees as receiver;
- (b) the sum of \$1,800 paid to him as fees as receiver;
- (c) the sum of \$2797 paid to him as compensation by said Jones;
- (d) the sum of \$500 paid to him by Mr. Ingalls pursuant to their unlawful agreement for the division and pooling of fees;

(e) the sum of \$250 paid as fees to Mr. Ingalls as attorney for the receiver;

(f) the sum of \$250 paid as fees to Mr. Harrison as attorney for the receiver;

(g) the sum of \$650 paid to the law firm of Abernethy and Simkins;

(h) an amount being the difference between the sum paid to said Simkins as expenses and such sum as on a re-reference it should be found he should be allowed therefor;

(i) the sum of \$53,460.68 being the difference between \$281,000 paid by Proctor for said property and \$224,742.32, the aggregate of the judgments in favor of the Prudential Insurance Company of America secured by the Madison County farms, less the \$2797 paid to said Simkins by Jones and for which his account is being surcharged as aforesaid;

(j) the amount of the profits or commissions to Jones.

19. It objects to the report of the Special Master for that the Special Master should have concluded as a matter of law that with respect to the sum of \$2200: The Home Insurance Company of New York under date of August 1, 1932, delivered to the receivers a check in that amount by reason of a loss occurring on the property described in Cause No. 945, payment of which check was subsequently stopped by the Home Insurance Company, and payment thereof thereafter made to the Prudential Insurance Company under date of August 19, 1932, although the receivers paid from the receivership funds the premiums on account of said insurance; that said sum was, without the knowledge of Crites, Inc., paid to the Prudential Insurance Company who subsequently credited the same on account of the loan on its records, but that counsel for said Insurance Company in preparing the judgment entry did not credit the borrowers with the payment of said sum of \$2200 and that judgment in said cause was taken for plaintiff in said cause in excess of that which was due, namely, in excess by an amount equal to \$2200 and interest thereon to the date of judgment; and that said sum should be accountable to the defendant by said receivers.

20. It objects to the report of the Special Master for that the Special Master should have concluded as a mat-

ter of law that it does not appear that any adjustment was made by the receivers and the Prudential Insurance Company with respect to the unearned premiums due on account of the insurance effected by the receivers and which was in force at the time of the acquisition of the title to said real estate by The Prudential Insurance Company. For such amount said receivers should be held accountable.

This defendant objects that the Special Master's conclusions of law are not sustained by the law and the evidence.

HAFENBERG AND ROSENBAUM and
ARNOLD WRIGHT, PURPUS & HARLOR
*Attorneys for the Defendant,
Crites, Inc.*

The objections and exceptions of Crites, Incorporated to the findings of fact and to the report of Gale H. Butt, Esq., Special Master, filed March 13, 1939 in Causes Nos. 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 are identical with the foregoing objections and exceptions filed in Cause No. 927.

APPLICATION FOR COMPENSATION AS COUNSEL FOR RECEIVERS.

(Filed May 25, 1939)

Now comes O. C. Ingalls, one of the attorneys for the receivers herein, withdraws all previous applications for compensation herein and presents his application for compensation in the sum of \$2500.00, plus expenses in the sum of \$82.25, as per itemized statement attached.

Reviewing this proceeding, on the 17th day of February, 1927, there was approximately \$1800.00 left in the fund in the hands of the receivers of this estate and there was no evidence at that time that there would be any fur-

ther funds coming into the estate and an application was drafted in behalf of this counsel for the sum of \$1200.00, plus the expenses, and subsequently when exceptions were filed to the accounts of the receivers, supplemental application was filed for the sum of \$300.00. This amount was based upon the time expected to be consumed in handling the matter of exceptions to the receivers' accounts, but in as much as these matters have been pending since the spring of 1937, the time expended in these matters has been considerably more, and as a matter of fact, the total amount of hours consumed by this counsel in this matter, excepting therefrom the time spent in trial, are 512 hours. If there appears to be any item in the account that has to do with the foreclosure in any way, the services were incurred at the request of the receivers and in the receivers' benefit.

On the 2nd day of June, 1937, the Prudential Insurance Company filed objections to the application for additional compensation, maintaining that the Prudential Insurance Company has made payment in full to O. C. Ingalls for services rendered to the Prudential. According to correspondence passing between the offices, on April 18, 1932, Mr. Selby, of the firm of Ingalls & Selby, wrote Mr. Harrison, counsel for the Prudential Insurance Company, and stated that "we firmly request the advancement of retainer fee of \$50.00 per case, or a total of \$1100.00." Mr. Harrison, on April 21st, states that he "passed the request, with the recommendation that a retainer fee be advanced to you." This retainer fee was advanced and 50% of it was paid over to Richard Simkins, receiver in this case, in accordance with previous agreement entered into whereby it was agreed that the receivership fees and the attorneys fees would be pooled and divided equally between the two offices. Mr. Harrison, as counsel for the insurance company, in his letter of May 18, 1937, says that "the Prudential is going to oppose your fee." On May 21st we answered that "the previous correspondence fixed the matter of fees as far as the Prudential is concerned." See Exhibit 13 W—page 205—record. But we go back to the correspondence passing between Mr. Harrison, as counsel for the Prudential, and ourselves on

April 11, 1932 wherein Mr. Harrison says "I think it would be entirely fitting for us to ask the Court for an allowance as soon as there is any proceeds in the receivership. You will not find that the company will be niggardly about any reasonable fee allowed."

Pursuing the objections of the Prudential, as aforesaid, it states that "the receivers have on hand approximately \$1800.00; that there is still an unpaid balance due on the advancements made by it to the receivers of approximately \$2,000.00 and that in truth and in fact on the repayment of said advancements, the receivership herein would be insolvent and unable to liquidate the receivership expenses." In answer to this allegation, the Court will find that the Prudential Insurance Company owed the receivers \$2,000.00, which would increase the assets to \$3,800.00, and in addition thereto, the Prudential Insurance Company had overcharged in cause #946 \$2200.00, which it had received from the Home Insurance Company, and which had not been accounted for to the Court, and which the Prudential was trying to keep for itself as it was trying to keep for itself the sum of \$666.25 in cause #944 and the sum of \$1468.75 in cause #945.

They further allege in their answer that Richard Simkins is an attorney at law and that he has prepared all reports and other pleadings filed by the receivers in this cause. We deny emphatically that this allegation is true. The only thing that Mr. Simkins prepared was the reports of the receivers, and he called these reports the first and final reports, which in fact was not true; that it was necessary to reprepare the reports in cases #944 and #945, which reports were prepared by this counsel and the legend appearing thereon as first account of receiver; that at no time did Richard Simkins ever prepare any pleadings or entries in this cause.

First, let us analyze the relationship between the Prudential Insurance Company and this applicant. Originally this applicant was one of co-counsel in preparing petitions for foreclosure. A study of the time spent on this matter will indicate that up to the time of the sale the Prudential Insurance Company was conferring with this office, and that all of the papers, except the decree pr

confesso, were prepared in this office. Shortly after the sale, and about the time for the confirmation of the sale, for some reason the Prudential made no further contacts with this office and nothing was known about the order of sale. This counsel was not called into consultation, nor was he present at the time the sale was confirmed by the Court, but during all this period this counsel was busy doing the bidding of the receivers, since he originally was appointed as one of the counsel for the receivers, and the receivers' record will show that all of the work to be done by the counsel for the receivers was done by this office.

In September, 1935, counsel was advised that an order had been taken, paying the receivers \$1800.00 each. Immediately thereafter I went to the Court to look for the first account of the receivers, which I understood had been filed, and the account was not in the files. I took the matter up with the receivers and they said they had filed this account and that the Prudential had taken the accounts from the Court, with the idea that the Prudential was going to audit these accounts and if they found the order was correct and the books of the receivers in proper form, there would be no objections filed to the accounts and they could be confirmed. Then, began the battle made to compel the Prudential Insurance Company to return these accounts. They had had a copy of the accounts in their hands since April 13, 1934.

In September, 1936, this applicant filed a proceeding to compel the Prudential to show cause why it should not be punished for contempt for withholding the final accounts of the receiver. The Court is familiar with all the correspondence that passed between Mr. Ingalls and Mr. Harrison, which correspondence appears in the records. From the time the application to show cause, the Prudential Insurance Company has been hostile and your counsel does not desire in this proceeding to represent the Prudential Insurance Company, yet the exceptions filed in this cause by Crites, Inc. are aimed at both the Prudential Insurance Company and the receivers, and in defending the receivers your counsel was in a way compelled to defend the Prudential Insurance Company.

The receivership was for the benefit of the Prudential Insurance Company. It was to take care of the property

covered by their mortgage until such time that the mortgage could be foreclosed. The receivers did the best that they knew how, but with corn selling for 14¢, oats selling for 24¢, and wheat selling for 34¢, it is easy to understand why the receivers in this case made only a net profit of \$1.00 per acre out of the operation of the farms. Had 1932 and 1933 been normal years, there should have been a net profit out of these farms of approximately \$35,000.00 per year, or \$5.00 per acre. But that is beside the point. These receivers had duties to perform and they called upon this counsel for legal service and assistance. They had about twenty-five tenants, all more or less insolvent, and it was necessary to secure the trust and for that purpose the services of counsel were used.

The receivers did not precipitate this matter in the hands of the Court and put the matter in the hands of the receivers, but it was the Prudential Insurance Company, and if anyone should be responsible for the deficiency, then the Prudential Insurance Company should be. They had the opportunity to examine the accounts of the receivers and representatives were constantly in touch with the receivers. The estate was appraised at nearly one-half million dollars. The Prudential Insurance Company bid in the properties at the Marshal's sale, and approximately eight months thereafter the final account was filed with Judge Hough, and it now appears that a copy of the final accounts and not the original was turned over to the Prudential Insurance Company for an audit. They had four years in which to audit these accounts, but it is apparent that the insurance company did not audit the accounts, for their objections filed in this cause on June 2, 1937, allege that the receivers owe \$2,000.00 to the Prudential Insurance Company, whereas, in truth, the Prudential Insurance Company had approximately \$4,200.00 arising out of the receivership or out of the sale of the lands, which they were withholding from the receivers, and from this Court and failed and neglected to apprise the Court that they had monies belonging to the receivers until it was pointed out, by counsel for Crites, Inc., that the Prudential Insurance Company was withholding \$666.25 in cause #944 and \$1468.75 in cause #945 from the re-

ceivers and that the Prudential Insurance Company was withholding from this Court the sum of \$2200.00, which the Prudential Insurance Company had received as a result of a fire from the Home Insurance Company and which \$2200.00 was due in cause #946, which should have been accounted for by the Prudential Insurance Company as in excess received over and above the purchase price of the farm, which sum should be held by this court for further distribution, but should not be credited to the receivers' account. This counsel made strenuous demands upon counsel for the Prudential Insurance Company to pay this money over to the receivers, and after about two months of threatening letters, the Prudential Insurance Company did turn over to the receivers the sum of \$666.25 due in cause #944 and the sum of \$1468.75 due in cause #945 and did turn over to the U. S. Marshal \$2200.00, being the amount due in cause #946. Does this show that the Prudential Insurance Company is in Court with clean hands? Does the entire transaction, from the sale of the assets down to the very last proceedings in this cause, show that the Prudential Insurance Company has been handling this matter openly and cleanly?

Had the Prudential Insurance Company paid back to the receivers the money which was properly due them, it might not have been necessary to have had this long and tedious procedure precipitated by the exceptions of Crites, Inc. Then, again, it is the belief of this applicant that it was the Prudential Insurance Company and not the receivers that Crites, Inc. were striking at and filing their exceptions, and had it not been for the actions of the Prudential Insurance Company in this matter, exceptions to the accounts of the receivers might not have been filed and the necessary additional counsel fees charged by this applicant would not have been necessary.

The Prudential Insurance Company has deposited as court costs in this case the sum of \$50.00 per case and it is certain that all of this \$50.00 will not be needed to pay the costs, provided the costs of this proceedings are charged to the proper parties, and in case the amount of money on hand is not sufficient to pay all the costs, the Prudential Insurance Company should be surcharged, and the money

paid either out of the costs deposited or directly by the Prudential itself, if the costs be not sufficient. *Ritchie v. Brett*, 112 O. S. 583, beginning at page 583 and particularly on page 587, the cause reads:

"Where a party has received benefits from receivership in excess of the amount required to be paid, then plaintiff is liable."

53 C. J. page 305, states the same rule. Clark on Receivers, Volume 1, page 890, Section 641, Sub-section 1, states:

"Where funds in an estate are insufficient, the usual rule is that the person who brings the action must pay."

Sworn statement of services in this cause show that counsel for the receivers has spent 512 hours wholly on services rendered to the receivers, and at their request, and that he has incurred expenses as shown by statement attached. He has spent five (5) full days in court for which he requests the sum of \$500.00 and the balance of the \$2500.00 represents approximately \$4.00 per hour for the time spent.

It is the rule in this Circuit that an attorney fee of \$7.50 per hour is reasonable in bankruptcy matters and the courts have held that Federal equity proceedings are in no wise different from bankruptcy. A very recent case in northern Ohio, *In the Matter of Barr-Hotel Company*, 23 Fed. Sup. 540, 37 A.B.R. (N.S.), page 185, third syllabus:

"In corporate reorganization proceeding involving the debtor whose capital structure and outstanding debts were comparatively simple and whose estates was of moderate value, a charge of \$7.50 per hour for the services of the attorneys for the trustee held reasonable and proper."

In conclusion, applicant maintains that the Prudential Insurance Company of America has not acted in good faith in this cause; that its action is withholding approximately \$4200.00 in these proceedings, while claiming that the receivers owed it \$2,000.00, puts the insurance company in a bad position to object to the allowance of a reasonable fee in this matter, and withholding of the accounts of the receivers without comment indicated they did not care to disturb the situation and if nobody raised the question, it

was ahead \$4200.00. It was necessary for this counsel to bring an order to show cause to compel them to produce or explain the absence of the accounts, and they should not be at this time permitted to come into this Court and tell the Court what fees should be charged, since their own counsel stated in a letter that the insurance company would not be niggardly in the payment of any reasonable fee earned, and it is maintained by this applicant that a fee of \$2500.00 under all the circumstances in the case is fair and reasonable and should be allowed by this Court.

Respectfully submitted,

O. C. INGALLS,
Attorney for Receivers.

STATE OF OHIO }
COUNTY OF FRANKLIN } ss.

O. C. Ingalls, being first duly sworn, states that he is one of the attorneys for the receivers herein and that the facts stated in the foregoing application are true, as he verily believes.

O. C. INGALLS.

Sworn to before me and subscribed in my presence this 24 day, of May, 1939.

M. L. INGALLS,
*Notary Public of Franklin
County, Ohio.*

We, the undersigned Receivers, approve the foregoing application and state that the services rendered by Ingalls & Selby and O. C. Ingalls were reasonable and worth the amount requested herein.

RICHARD SIMKINS,
Receiver.

GEORGE FLORENCE,
Receiver.

(Statement of services omitted by stipulation.)

**STATEMENT OF EXPENSES INCURRED
BY ATTORNEYS FOR RECEIVERS
INGALLS & SELBY.**

1573 miles @ 5¢ per mile.....	\$78.65
Telephone calls	3.60
Total.....	\$82.25

OBJECTIONS OF CRITES, INC., TO THE APPLICATION OF O. C. INGALLS FOR ALLOWANCE OF ADDITIONAL COMPENSATION AS ATTORNEY FOR THE RECEIVERS.

(Filed October 10, 1939)

Now comes the defendant, Crites, Inc.; and objects to the application of O. C. Ingalls filed herein on May 25, 1939, for the allowance of additional compensation as attorney for the receivers for the reason and upon the ground that:

1. The additional time mentioned in said application over and above the time mentioned in preceding applications was consumed in the defense of the activities of Receiver Simkins, applicant's client;

2. The additional recoveries in excess of \$4,200.00 mentioned in said application were the result of activities of counsel for Crites, Inc.

**HAFFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS & HARLOB,
By R. H. LE FEVRE**

MEMORANDUM.

(Filed February 19, 1940)

The Receivers herein having filed their first accounts and O. C. Ingalls, their attorney, having filed his application for compensation; objections to said accounts and to the application of O. C. Ingalls, were filed by Crites, Incorporated. The issues involved were referred to a Special Master.

On February 16, 1939, the Special Master filed his report and a motion to confirm the same was filed by the Receivers. Objections to said report were filed by Crites, Incorporated. The matter came on to be heard by the Court upon said Report and the Objections thereto. Arguments of counsel were heard and briefs were filed on behalf of the interested parties. The Court have fully and carefully considered the Report of the Master; the Objections filed thereto; and the brief and arguments of counsel, and being fully advised in the premises, Finds:

That said report of the Master is in all respects correct and in conformity with law and that the same should be approved and confirmed.

That the motion of the Receivers for the confirmation of said Report should be sustained and the objections of Crites, Incorporated to said Report of the Master should be overruled and denied.

The Court further finds from an examination of the records and files of this Court that the Receivers have filed supplemental reports purporting to be in compliance with the recommendations of the Master as shown in Section VII, Part C, under Exception 6, Page 41 of the Master's Report. It will be ordered that said supplemental reports and any objections thereto shall come on for hearing before this Court on March 12, 1940, at ten o'clock in the forenoon.

The Court further finds that Exception 8, as filed to the Report of the Receivers should be taken under consideration by the Court in accordance with the recommendation of the Master, made under Section VII, Part C, Page 42, of the Master's report, to be heard on March 12, 1940 at

ten o'clock in the forenoon and thereafter determined by the Court.

The Court further finds that O. C. Ingalls has filed a new application for allowance of compensation, purporting to be in compliance with the recommendation of the Master appearing in Part B, 1, Page 48, of the Master's Report. Objections having been filed thereto by Crites, Incorporated and an answer by the applicant, it is ordered that the issues so presented shall come on for hearing before this Court on March 12, 1940 at ten o'clock in the forenoon.

The Court will further order that all pleadings, objections and exceptions to be filed in any of the foregoing matters to be heard on March 12, 1940, shall be filed herein on or before March 1, 1940.

The Court will adopt the findings of fact and conclusions of law of the Special Master as those of the Court, but the memorandum of the Master is not adopted as that of the Court.

(Signed) UNDERWOOD,
Judge, U. S. District Court.

Dated: Feb. 19, 1940.

MEMORANDUM.

(Filed March 12, 1940)

This day the above named cause came on to be heard upon the supplemental reports heretofore filed by the Receivers herein; upon "Exception 8" as filed to the original reports of the Receivers by Crites, Inc.; and upon the application of O. C. Ingalls, counsel for the Receivers, praying for allowance of additional compensation in the sum of \$300.00.

The Court having heard the statements and arguments of counsel for all interested parties, and having carefully considered the records and files in connection herewith; being fully advised in the premises, Finds:

That the supplemental reports of the Receivers are in all respects correct and in conformity with law; that no objections or exceptions have been filed thereto and that the same should be approved and confirmed.

That "Exception 8" filed by Crites, Inc., against the original reports of the Receivers should now be dismissed.

That O. C. Ingalls, as counsel for the Receivers, has, since the date of the last allowance to him made, rendered services in said capacity beneficial to the estate and that the reasonable value of said services is \$275.00. That the compensation due said counsel should be apportioned to and charged in said cases Nos. 927 to 948 inclusive, in the amount of \$12.50 per case.

The Court further finds that the motion heretofore filed asking that said Cases Nos. 927 to 948 inclusive be consolidated, should be sustained. An order will be entered *nunc pro tunc* as of June 2, 1937, consolidating said cases and providing that they shall be docketed as No. 927. Entry accordingly.

(Sig) UNDERWOOD,
Judge, U. S. District Court.

Dated: March 12, 1940.

ENTRY.

(Entered March 12, 1940—*nunc pro tunc* as of June 2, 1937)

Upon suggestion of counsel for the receivers and counsel for Crites, Inc., defendant herein, that the causes in Equity numbered 927 to 948 inclusive on the docket of this Court, wherein Prudential Insurance Company of America is complainant and H. M. Crites, *et al.*, are defendants, be consolidated, and it appearing to the Court that the Master to whom these causes have been referred has considered the causes substantially as if an order of consolidation had been entered herein, and that the principal exceptions of Crites, Inc., raise questions common to more

than one, or all of said causes, and with the consent of counsel for all interested parties, it is ordered that said causes numbered 927 to 948, inclusive, be consolidated and proceed as one cause, *nunc pro tunc*, as of June 2, 1937, the date of the entry of the order of reference to the Master herein, under the title of "Prudential Insurance Company of America, Complainant, *vs.* H. M. Crites, May Reber Crites, Crites, Inc., and Mid-State Realty Company, Defendants, in Equity No. 927, Consolidated Cause", provided, however, that this order shall not affect or impair the substantive rights, legal or equitable, of the parties, the receivers, or their counsel, which any of said parties would have had or have in the respective suits hereby consolidated if this consolidation had not been ordered.

/s/ UNDERWOOD

Judge

Approved:

O. C. INGALLS

Attorneys for Receivers

DAVIS HARRISON

*Attorneys for Prudential Insurance
Company of America*

ARNOLD, WRIGHT, PURPUS & HARLOR,

HAFFENBERG & ROSENBAUM

Attorneys for Crites, Inc.

ORDER.

(Entered April 8, 1941)

This cause came on to be heard by the Court upon the application of O. C. Ingalls, as one of the attorneys for the Receivers herein, asking allowance of compensation for such services in the sum of \$2500.00 and expenses in the sum of \$82.25. Objections to said application were filed by Crites, Inc.

The Court having heard the arguments and statements of counsel, and having carefully considered the same, together with the record evidence and the briefs filed by counsel for the parties, and being fully advised in the premises FINDS:

That said application for compensation should be allowed in the sum of \$2200.00 as compensation in full for all services rendered by said attorney as one of counsel for said Receivers. That the order entered by this Court on March 12, 1940 granting partial compensation to said applicant should be set aside and held for naught, and the petition upon which said former order was granted will be denied and dismissed.

That the application of O. C. Ingalls for reimbursement in the sum of \$82.25 should be allowed in that amount.

That the services of G. H. Butt, Special Master herein, are reasonably worth the sum of \$1000.00 and that allowance of compensation to him for such services should be made in that amount.

That the services of Florence K. Snively, as Court Reporter herein are reasonably worth the sum of \$247.00 and that allowance of compensation to her for said services should be made in that amount.

That each of the allowances made in this order should be equally apportioned among the 22 cases consolidated herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED: That O. C. Ingalls be, and he hereby is, allowed the sum of \$2200.00, as compensation in full for his services as one of counsel for the Receivers herein.

That the said O. C. Ingalls be, and he hereby is allowed the sum of \$82.25 as reimbursement for his expenses incurred herein.

That G. H. Butt, Special Master be, and he hereby is allowed the sum of \$1000.00 as compensation in full for his services herein.

That Florence K. Snively be, and she hereby is allowed the sum of \$247.00 as compensation for her services herein.

IT IS FURTHER ORDERED: That each of said allowances made herein, shall be apportioned equally among the 22 cases consolidated herein. That in each case where the

funds in the hands of the Receivers are insufficient to pay the respective amount apportioned to that estate, such deficiency shall be added to the like deficiencies existing in other individual cases. That there shall be applied to such total deficiency, all funds in the hands of the Clerk of this Court paid to said Clerk for, or by, The Prudential Insurance Company of America as deposits in Cases Nos. 927 to 948 inclusive and not required by said Clerk for payment of other costs in these cases. And the Clerk is ordered to pay said money, in the amount of \$573.18 to the Receivers herein for that purpose. The Prudential Insurance Company of America, is ordered and directed to forthwith pay to said Receivers the sum \$788.52 required to pay the balance of said deficiency. From the funds so collected and held, the Receivers are ordered and directed to pay the allowances herein granted.

UNDERWOOD

Judge, U. S. District Court

Dated: *April 8, 1941*

MOTION TO RETAX COSTS.

(Filed April 29, 1941)

Now comes the plaintiff and the receivers by their attorneys and moves the Court to retax the costs heretofore made and assessed against the plaintiff by this Court by an entry dated April 8, 1941.

DAVIS HARRISON

Attorneys for Plaintiff.

INGALLS & WARNICK

Attorneys for Receivers.

ORDER.

(Entered September 8, 1941)

The Receivers are authorized to pay \$50.00 premium on surety bond for the faithful performance of their duties.

UNDERWOOD

U. S. District Judge

Approved:

O. C. INGALLS

Attorney for the Receivers

ORDER.

(Entered February 27, 1942)

This cause as heretofore consolidated by order heretofore duly entered, having come on to be heard on the first accounts and amended first accounts of the receivers in each of the causes consolidated herein, on the exceptions Crites, Incorporated filed thereto, on the report of the Special Master, Gail Butt, Esq., on the objection of Crites, Incorporated to said report, on the supplemental accounts of the receivers to their first and amended first accounts filed pursuant to the findings and recommendations contained in said report of the Special Master to which supplemental accounts no objections were interposed, and the said receivers having moved that the said report of said Special Master be confirmed, and the Court having heard argument and considered the briefs submitted thereon, and now being advised in the premises,

It is ordered that the objections of Crites, Incorporated to said report of said Special Master be, and the same are, hereby overruled, and that the said report of said Special Master be, and the same is, hereby approved and confirmed, except only as to the opinion of said Special Master filed with said report, which is not adopted.

It is further ordered that the findings of fact and the conclusions of law in the said report of said Special Master be, and hereby are, adopted as the findings of fact and conclusions of law of the Court on the issues herein.

It is further ordered, adjudged and decreed that the first accounts and amended first accounts of the said Receivers, George Florence and Richard Simkins, in each of said causes Numbers 927 to 948, both inclusive, heretofore consolidated herein as one cause by order of this Court, and their said supplemental accounts filed thereto pursuant to the findings and recommendations in the said report of the Special Master be, and the same are hereby approved and confirmed, and the exceptions of Crites, Incorporated to the first accounts and amended first accounts of said Receivers be and the same hereby are overruled and dismissed.

In order that the estate may be closed, the Court further orders the Receivers to proceed to file forthwith their final account covering the period following the period covered by the first and amended first accounts and the supplemental accounts hereinabove approved.

Coming now to the motion of plaintiff and of the receivers to retax the costs which were levied against the Prudential Insurance Company of America and paid to the receivers by the Prudential Insurance Company of America, the Court delays action on this motion until the Receivers file their final account with this Court, at which time the Court will then pass upon the motion as made.

Crites, Incorporated excepts to the foregoing order in its entirety.

UNDERWOOD

Approved:

U. S. District Judge

INGALLS & WARNICK & DAVIS HARRISON

Attorneys for Plaintiff

INGALLS & WARNICK & DAVIS HARRISON

Attorneys for the Receivers

As to form only.

HAFFENBERG & ROSENBAUM &

ARNOLD, WRIGHT, PURPUS & HARLOR

Attorneys for Crites, Incorporated.

NOTICE OF APPEAL.

(Filed May 25, 1942)

Notice is hereby given that Crites, Incorporated, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the sixth circuit from the order entered in this consolidated action on February 27, 1942 over-ruling the objections of Crites, Incorporated to the report of the Special Master and approving and confirming said report, adopting the findings of fact and the conclusions of law in said report as the findings of fact and the conclusion of law of the court, ordering, adjudging and decreeing that the first accounts and amended first accounts of the receivers, George Florence and Richard Simkins, in each of the causes Nos. 927 to 948, both inclusive, consolidated herein as one cause, and their supplemental accounts be approved and confirmed and the exceptions of Crites, Incorporated to the first accounts and amended first accounts be over-ruled and dismissed, and ordering that the receivers file their final account for the period following the period covered by the first and amended first accounts and the supplemental accounts thereby approved.

Dated May 25, 1942.

HAFFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS AND HARLOR,
By **J. C. HARLOR, Member of firm,**
Attorneys for Appellant,
Crites, Incorporated.

Address:

Haffenberg & Rosenbaum
100 W. Monroe St.
Chicago, Illinois
Arnold, Wright, Purpus & Harlor
Huntington Bank Building
Columbus, Ohio

I hereby certify that service of the foregoing Notice of Appeal was made May 23, 1942, by delivering in person

four copies thereof to O. C. Ingalls, Esq., counsel of record for Prudential Insurance Company of America, Richard Simkins and George Florence, Receivers.

J. C. HARLOR

BOND ON WRIT OF ERROR OR APPEAL.

(Filed May 25, 1942)

KNOW ALL MEN BY THESE PRESENTS

That we, Crites Incorporated, as principal and The Travelers Indemnity Company of Hartford, Connecticut as sureties, are held and firmly bound unto Prudential Insurance Company of America—Richard Simkins, Receiver, and George Florence, Receiver in the full and just sum of Two Hundred and Fifty and No/100 Dollars, to be paid to the said Prudential Insurance Company of America, Richard Simkins Receiver and George Florence Receiver—Their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of May in the year of our Lord one thousand nine hundred and forty-two.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Eastern Division, in a suit depending in said Court between Prudential Insurance Company of America as Plaintiff and Crites, Incorporated, *et al*, as defendants—being consolidated A Cause No. 927 on the docket of said Court a decree was rendered against the said Crites, Incorporated and the said Crites, Incorporated, having filed notice of appeal in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and citing and admonishing appellees to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the Sixth day of July next.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Crites, Incorporated shall prosecute said appeal to effect, and answer all damages and cost if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

ROSE KRANKOVICH

CRITES, INCORPORATED

By J. C. HARLOR, *President* (Seal)

THE TRAVELERS INDEMNITY COMPANY (Seal)

ROBERT D. LEIGHNINGER (Seal)

Attorney-in-Fact

Approved by—

UNDERWOOD,

United States District Judge

Southern District of Ohio.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Filed May 25, 1942)

And now comes Crites, Incorporated, appellant-defendant, and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal, to-wit:

(A) In Consolidated Cause No. 927 the following:

(1) Petition of plaintiff to recover money on note, to foreclose mortgage and for appointment of receiver, filed February 17, 1932 excluding exhibits attached;

(2) Order appointing receivers entered February 17, 1932;

(3) All orders entered on the receivers' applications;

(4) Order making Mid-State Realty Company party defendant entered March 18, 1942;

- (5) Application of receivers filed January 17, 1933;
- (6) Decree pro confesso entered May 2, 1933;
- (7) Amount of valuation in the appraisers' appraisal filed May 17, 1933;
- (8) Order entered July 5, 1933;
- (9) Order entered July 13, 1933;
- (10) Notice to Crites, Incorporated, and its acknowledgment of service filed July 15, 1933;
- (11) Plaintiff's motion for confirmation filed July 18, 1933;
- (12) Order of confirmation and distribution entered July 18, 1933;
- (13) The date of sale, the sale price and the purchaser's name in the Marshal's return filed July 18, 1933;
- (14) Application of O. C. Ingalls for compensation filed February 19, 1937 and so much of the statement of account attached thereto as shown by entries of February 15, 16, 17, 18, 22, in 1932, March 22, May 2, May 4-8, July 7, July 18, and July 25 in 1933; and the statement commencing on page 7 thereof with the words "on April 19" to the end thereof.
- (15) The following excerpts from the first and final account of the receivers filed February 19, 1937, to-wit:
 - (a) The charges under date of August 4, 1933;
 - (b) The amount of the total charges;
 - (c) The credits for payments for stenographic and telephone service to Ingalls and Selby and to Abernethy and Simkins under date of March 18, 1932;
 - (d) All three credit entries under date of December 31, 1932;
 - (e) All credit entries under date of January 14, 1933;
 - (f) All credit entries under date of July 19, 1933;
 - (g) All credit entries for telephone expense, stenographic fees and payments to George Florence and Richard Simkins under date of November 15, 1933;
 - (h) Credits for stenographic fees under date of April 16, 1934;

- (i) The amount of the total credits;
- (j) The amount of balance.
- (16) Order entered May 13, 1937;
- (17) Objections to Ingalls' application by plaintiff filed June 2, 1937;
- (18) General order of reference entered June 2, 1937;
- (19) Exceptions of Crites, Incorporated, to receivers' reports filed July 24, 1937;
- (20) Application of O. C. Ingalls for additional fee filed September 29, 1937, not including memorandum;
- (21) Order striking "final" from caption of receivers' reports entered July 18, 1938;
- (22) Report of Special Master filed February 16, 1939, together with the transcript of testimony and exhibits, excluding arguments of counsel on the last thirty-one pages of the transcript, excluding the exhibits read into the transcript of the testimony, and excluding receivers' exhibit C but including the following excerpts from said receivers' exhibit C, to-wit:

All items under the following dates in the year 1933, namely, all items under dates of June 23 to 30, both inclusive, and July 1; the first three items under date of July 3; the two items under date of July 5 mentioning Little and Jones; the first six items under date of July 17; all items under date of July 18 and 19; the last item under date of July 21; the item under date of July 24; all items under date of July 29 except the item referring to checks; the last item under date of July 31; the first seven items under date of August 4; all items under dates of August 7 and 9; the first three items under date of August 18; the first item under date of August 30; the first item under date of August 31; and the first item under date of September 26.
- (23) Objections and exceptions of Crites, Incorporated to Master's report filed March 13, 1939;
- (24) Application of O. C. Ingalls for compensation filed May 25, 1939, not including the itemized statement of services attached to said application;

(25) Objections of Crites, Incorporated to Ingalls' application filed October 10, 1939, not including memorandum;

(26) Memorandum opinion of court filed February 19, 1940;

(27) Memorandum opinion of court filed March 12, 1940;

(28) Order of consolidation *nunc pro tunc* as of June 2, 1937 entered March 12, 1940;

(29) Order entered April 8, 1941;

(30) Motion of plaintiff to retax costs filed April 29, 1941, but not including memorandum attached;

(31) Order of September 8, 1941;

(32) Order and decree of February 27, 1942;

(33) Notice of Appeal filed by Crites, Incorporated;

(34) Bond for costs;

(35) Designation of Contents of Record;

(36) Statement of Points relied on;

(37) Clerk's certificate to the record.

(B) The following petitions, orders, applications, notices, decrees, exceptions and objections corresponding with those above designated for Consolidated Cause Number 927, but filed and entered in each of Causes Numbers 928, 929, 930, 931, 933, 934, 935, 936, 937, and 947 consolidated herein prior to the entry of the order of consolidation entered March 12, 1940, *nunc pro tunc* as of June 2, 1937, which the clerk is hereby requested to certify are identical with the corresponding petitions, orders, applications, notices, decrees, exceptions and objections filed and entered in Consolidated Cause No. 927, except for their differences, if any, and to set out only the difference to avoid repetition, to-wit:-

(1) Petitions of plaintiff to recover money on note, to foreclose mortgage and for appointment of receiver, filed February 17, 1932 excluding exhibits attached;

(2) Orders appointing receivers entered February 17, 1932;

(3) All orders entered on the receivers' applications;

(4) Orders making Mid-State Realty Company party defendant entered March 18, 1942;

(5) Applications of receivers filed January 17, 1933;

(6) Decrees pro confesso entered May 2, 1933;

(7) Order entered July 5, 1933;

(8) Order entered July 13, 1933;

(9) Notice to Crites, Incorporated, and its acknowledgment of service filed July 15, 1933;

(10) Plaintiff's motion for confirmation filed July 18, 1933;

(11) Order of confirmation and distribution entered July 18, 1933;

(12) Order entered May 13, 1937;

(13) General order of reference entered June 2, 1937;

(14) Exception of Crites, Incorporated, to receivers' reports filed July 24, 1937;

(15) Order striking "final" from caption of receivers' reports entered July 18, 1938;

(16) Objections and exceptions of Crites, Incorporated to Master's report filed March 13, 1939.

(C) The following excerpts from the appraisements, marshall's returns and receivers' accounts filed prior to consolidation in each of Causes Numbers 928, 929, 930, 931, 933, 934, 935, 936, 937, and 947 consolidated herein to-wit;

(1) The amounts of the valuations in the appraisers' appraisements filed May 17, 1933 in each of said causes;

(2) The dates of sales, the sales prices and the purchasers' names as set forth in the Marshall's returns filed July 18, 1933, in each of said causes;

(3) The following excerpts from the first and final accounts of the receivers filed February 19, 1937, in each of said causes:

(a) The charges under date of August 4, 1933;

(b) The amount of the total charges;

(c) The credits for payments for stenographic and telephone service to Ingalls and Selby and to Abernethy and Simkins under date of March 18, 1932;

(d) All three credit entries under date of December 31, 1932;

- (e) All credit entries under date of January 14, 1933;
- (f) All credit entries under date of July 19, 1933;
- (g) All credit entries for telephone expense, stenographic fees, and payments to George Florence and Richard Simkins under date of November 15, 1933;
- (h) Credits for stenographic fees under date of April 16, 1934;
- (i) The amount of total credits;
- (j) The amount of balance.

Dated May 25, 1942.

HAFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS AND HARLOR,
By J. C. HARLOR, *Member of firm,*
Attorneys for Appellant,
Crites, Incorporated.

I hereby certify that service of the foregoing Designation of Contents of Record on Appeal was made May 23, 1942, by delivering in person four copies thereof to O. C. Ingalls, Esq., counsel of record for Prudential Insurance Company of America, Richard Simkins and George Florence, Receivers.

J. C. HARLOR

APPELLANT'S STATEMENT OF POINTS ON APPEAL.

(Filed May 25, 1942)

And now comes Crites, Incorporated, appellant-defendant, and states the points on which it intends to rely on the appeal to be as follows:

- (1) The court erred in approving and confirming the report of the Special Master and adopting the findings of fact and the conclusions of law in the

said report as the findings of fact and the conclusions of law of the court.

(2) The court erred in over-ruling the objections of Crites, Incorporated, to the report of the Special Master.

(3) The court erred in not sustaining the respective objections of Crites, Incorporated to the report of the Special Master.

(4) The court erred in approving and confirming the first accounts and amended first accounts of the said receivers, George Florence and Richard Simkins, in each of the causes Nos. 927 and 931, both inclusive, 933 to 937, both inclusive, and 947.

(5) The court erred in overruling and dismissing each and all the exceptions of Crites, Incorporated to the first accounts and amended first account of the said receivers in said causes.

(6) The court erred in allowing credit to the receivers for fees to its attorneys and also in making any additional allowance to said attorneys for such fees.

(7) The court erred in allowing credit in said accounts for compensation to the receiver Simkins and in not requiring him to repay into court the moneys already paid to or retained by him therefor as shown in his said accounts.

(8) The court erred in allowing credit in said accounts to Simkins for expenses in a lump sum per month in excess of his actual expense and in not ascertaining and ordering him to repay the difference into court.

(9) The court erred in not surcharging the receiver Simkins with the amount of moneys he received from Mr. Ingalls by way of division of fees, the amount of moneys he received as compensation from Jones, the amount of the profits or commissions paid to Jones, the amount of the difference between the indebtedness due the plaintiff and the price paid by Col. Proctor for the Madison County farms, and the loss to Crites, Incorporated of the value of its equities in the respec-

tive Madison County farms as a result of the receiver Simkins' wrongful conduct and the violation of his trust.

Dated May 25, 1942.

HAFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS AND HARLOR,
By J. C. HARLOR, Member of Firm,
*Attorneys for Appellant,
Crites, Incorporated.*

I hereby certify that service of the foregoing Appellant's Statement of Points on Appeal was made May 23, 1942, by delivering in person four copies thereof to O. C. Ingalls, Esq., counsel of record for Prudential Insurance Company of America, Richard Simkins and George Florence, Receivers.

J. C. HARLOR.

APPELLEE'S DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

(Filed June 3, 1942)

Now come Richard Simkins and George Florence, Receivers, Appellees, and designate the following portions of the record, proceedings and evidence to be contained in the record on appeal, to wit:

(A) In Consolidated Cause No. 927, the following:

(1) The entire First Account of the receivers filed February 19, 1937, as of 1934.

(2) All of the Receivers' Exhibit C in the transcript of testimony filed February 16, 1939, with the report of the Special Master.

(3) Application of O. C. Ingalls for compensation, filed May 25, 1939, including the itemized statement of services attached to said application.

(4) The transcript of testimony and exhibits taken April 23, 1940 before the Court.

(5) Two copies of the receivers' transcript of the evidence included in appellant-defendant's designation as well as two copies of the receivers' transcript of the hearing of April 23, 1940, to be filed by the appellant-defendant with his designation.

(b) The receivers' first accounts in causes No. 928 to No. 948, inclusive.

INGALLS & WARNICK,
*Attorneys for Richard Simkins
and George Florence, Receivers.*

We acknowledge receipt of a copy of appellee's designation of contents of record on appeal this 3rd day of June, 1942.

HAFFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS AND HARLOR,
Attorneys for Appellant-Defendant.

AMENDED APPELLEE'S DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

Now comes Richard Simkins and George Florence, Receivers, Appellees, and designate the following portions of the record, proceedings and evidence to be contained in the record on appeal, to-wit:

1. The entire first account of the Receivers, filed February 19, 1937, as of 1934, with a stipulation by appellants that the remaining twenty-one accounts follow the same pattern.

2. All of the Receivers' Exhibit C in the transcript of testimony filed February 16, 1939, with the report of the Special Master.

3. Application of O. C. Ingalls for compensation, filed May 25, 1939, as designated by appellants but to include the itemized statement of services rendered attached to said application.

4. The transcript of testimony and exhibits taken April 23, 1940, before the Court.

5. Two copies of the transcript of testimony included in appellant defendants designation as well as two copies of the transcript of testimony taken at the hearing April 23, 1940, to be filed by the appellant defendant with its designation.

INGALLS & WARNICK,
*Attorneys for Richard Simkins
and George Florence, Receivers.*

We acknowledge receipt of a copy of Appellee's designation of contents of record of appeal this 23rd day of June, 1942.

HAFFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS AND HARLOR,
By J. C. HARLOR,
Attorneys for Appellant-Defendant.

ORDER.

(Entered June 30, 1942)

On motion of the attorneys for Crites, Inc., Appellant, and its notice of appeal dated May 25, 1942 having been filed herein with the Clerk of this Court on May 25, 1942, it is ordered that the time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals 6th Circuit be and it is hereby extended to and including August 22nd, 1942.

/s/ UNDERWOOD,
Judge.

Approved:

HAFFENBERG, & ROSENBAUM and
ARNOLD, WRIGHT, PURPUS & HARLOR,
Attorneys for Crites, Inc., Appellant.

INGALLS & WARNICK,
Attorneys for Appellees.

I, Harry F. Rabe, Clerk of the District Court of the United States for the Southern District of Ohio, Eastern Division, do hereby certify that the within and foregoing is a true, correct and complete transcript of those portions of the record and proceedings as is indicated in the Designation of Contents of Record or appeal of appellant filed on May 25, 1942 and in the amended designation of appellees filed June 24, 1942, except for the requested transcript of testimony and exhibits taken April 23, 1940 and copies thereof in the appellees' said amended designation which have not been furnished by either party.

I further certify that in Causes Numbers 928, 929, 930, 931, 933, 934, 935, 936, 937 and 947 the certain petitions, orders, decrees, notices, applications, motions, objections and exceptions called for in the designation of the appellants and not hereinabove verbatim set forth are identical with the corresponding orders, decrees, notices, applications, motions, objections and exceptions in Cause Number 927 except as to the differences hereinbefore set out in the record.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Columbus, Ohio, this 18 day of August, A. D. 1942.

HARRY F. RABE,
Clerk, U. S. District Court,

By H. E. PARKER,
Deputy Clerk.

(seal)

**STIPULATION TO ELIMINATE DESIGNATED
PORTIONS OF THE RECORD FROM BEING PRINTED.**

It is hereby stipulated by and between Crites, Incorporated, the appellant, and The Prudential Insurance Company and Richard Simkins and George Florence, receivers, appellees, by their respective attorneys, that the following

portions of the transcript of record on file in this cause need not be printed in full in the printed copies of the record, to-wit:

1. The descriptions of the various parcels of real estate in the petitions for foreclosure.
2. The descriptions contained in the Warranty Deed of The Prudential Insurance Company to Mary E. Johnston.
3. The Release Deeds introduced in evidence before the Master, of which an abstract need only be printed.
4. Receivers' Exhibit "C" introduced in evidence before the Master, to be marked and filed as an original exhibit.
5. The statement of services attached to the application of O. C. Ingalls filed May 25, 1939, to be marked and filed as an original exhibit.

Dated September 5, 1942.

**HAPFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS & HARLOR,
*Attorneys for Crites, Incorporated,
Appellant.***

**DAVIS HARRISON and
INGALLS & WARNICK,
*Attorney for Richard Simkins and
George Florence, Receivers, and
The Prudential Insurance Com-
pany of America, Appellees.***

[fol. 387]. PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—February 11, 1943

Before Hicks, Simons and Martin, JJ.

This cause is argued by Joseph Rosenbaum for Appellant and by Davis Harrison and O. C. Ingalls for Appellees and is submitted to the Court.

JUDGMENT—Entered April 12, 1943

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby amended as directed by the opinion of this court and, as so amended, is affirmed.

[fol. 388]. OPINION—Filed April 12, 1943

[fol. 389] [Stamp:] Filed Apr. 12, 1943. John W. Menzies,
Clerk

No. 9333

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT
CRITES, INCORPORATED, Appellant,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, RICHARD
SIMKINS and GEORGE FLORENCE, Appellees

Appeal from the District Court of the United States for the
Southern District of Ohio, Eastern Division

Decided April 12, 1943

Before Hicks, Simons and Martin, Circuit Judges

SIMONS, Circuit Judge:

The issues presented for review arise in a proceeding brought by the Prudential against its mortgagors and the

appellant as their grantee to foreclose 22 separate farm mortgages. They were brought to the attention of the court below by the appellant's exceptions to credits claimed in the account of Simkins and Florence, rent and profit receivers of the mortgaged properties, for certain fees and expenses, and a counterclaim that the receivers be surcharged for profits received by Simkins and Prudential in breach of fiduciary obligations.

The original mortgagors were Henry M. Crites and May R. Crites, his wife, residents of Ohio. In the years preceding the filing of the foreclosure bills they had executed mortgages to the Prudential upon 22 parcels of adjoining farm property in Madison and Pickaway Counties, Ohio, each of which was in default in the payment of interest, taxes and insurance, and each contained a clause providing that upon such default the rents were to accrue to the benefit of the grantee. On February 17, 1932, the Prudential began 22 separate foreclosure proceedings against Henry and May [fol. 390] Crites. It joined the appellant as a defendant because of conveyances made to it of the properties by the mortgagors. It is on the record explained that Crites, Incorporated, was formed by the unsecured creditors of the owners, in the hope that something might be salvaged from the farms. Each of the separate bills of foreclosure was in the name of Remy, Harrison & Remy of Indianapolis, Indiana, and Ingalls & Selby of Columbus, Ohio, as attorneys for the plaintiff. Upon their petition Simkins and Florence were appointed co-receivers "to collect the rents and proceeds of the real estate . . . to operate and manage said real estate through tenants, lessees or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom and to do such other acts as may be from time to time ordered by the court." By subsequent orders the receivers were authorized to borrow money from Prudential to pay taxes and insurance premiums and for the cultivation and preservation of the premises pending final determination of foreclosure, and likewise to borrow money from the bank for miscellaneous expenses and issue receivers' certificates therefor and also to execute leases to former tenants of Crites and others upon a share or crop rental basis. Though no order authorizing appointment of attorneys ap-

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 pears of record, it is clear that Harrison of the Indianapolis firm, and Ingalls of the Columbus firm acted as attorneys for the receivers with the knowledge and approval of the court.

No answer having been made to the plaintiff's bill in any of the cases, a decree *pro confesso* was entered in each on May 2, 1933, the mortgages and the equity of redemption were declared foreclosed, and the marshal directed, after statutory notice, to sell the real estate on July 1, 1933, at public sale, at not less than two-thirds of the appraised value, and to report the execution of the decree to the court. The properties were bid in by the mortgagee at approximately the up-set price, and in due course through its attorneys, Harrison and Ingalls, Prudential moved for confirmation and by order of July 18 the sale was confirmed.

The receivers submitted their accounts to the late Judge Hough in April, 1934, and in the belief that since the amount bid at the sale was substantially less than the mortgage debt no one other than the mortgagee had any interest, he permitted copies of the accounts to be sent to the Prudential for auditing. Subsequently Judge Hough died, the original accounts were lost, and the Prudential appeared to be in no hurry to complete the audit. Nothing further appears to have been done until June 2, 1937, when the Prudential objected to the allowance of the claims on the ground that they were excessive, and a hearing having been noticed for June 2, the appellant having received notice thereof, filed the exceptions on which it now relies. Hearings were had before the court and also after reference to a Special Master. The appellant's exceptions and counterclaim were overruled, the receivers' accounts amended and as amended approved, and the report of the Master affirmed by the court. Crites has alone appealed, and Prudential supports the order of affirmance.

Two principal contentions are made by Crites. The first relates to a fee paid to Simkins by an agent who negotiated the sale of a part of the property by Prudential after it had acquired title in foreclosure. It appears that prior to the sale Colonel Proctor of Cincinnati became interested in the 11 farms located in Madison County, and employed Jones, a real estate broker of Washington Court House, Ohio, to see if they could be bought from Prudential. Proctor was not a prospective bidder at the marshal's sale. He would buy the Madison County farms only if he could

acquire them as a single parcel and obtain a warranty deed therefor from Prudential. Jones solicited the aid of Simkins, one of the co-receivers, to initiate negotiations with Prudential for the purchase of the Madison County properties. Jones had employed Simkins in a professional capacity on other matters and knew that he had also represented Prudential in other foreclosure proceedings in Ohio. Jones and Simkins entered into an agreement by which Jones engaged Simkins to represent him as his attorney in consummating the purchase, his compensation, however, to depend on whether or not the deal would be completed.

Prudential representatives at first declined to do anything about Proctor's offer until after the marshal's sale, but finally entered into a contingent contract binding Prudential to convey if and when it acquired the property, and an initial payment of \$3,000 to bind the agreement was made by Jones about a week before the sale. While Simkins had told Judge Hough, in the presence of the attorney for the appellant, that he knew of a prospective buyer for the whole tract, he neither identified the buyer nor the price [fol. 392] he was willing to pay, either to the court or the appellant. Jones was present at the marshal's sale but did not bid because he lacked authority to do so. The sale was of each farm separately and he had been instructed to get all of the Madison County property or none. Shortly thereafter the contract between Prudential and Proctor was carried out and a deed executed reciting a consideration of \$249,106 but bearing tax stamps apparently indicating a substantially greater price. Jones paid Simkins a total of \$2,797, although part of it was not on account of the Proctor transaction but for other legal services Simkins had performed for Jones. Upon these facts the appellant contends that Simkins was guilty of violation of his trust in accepting employment from Jones, and seeks to have Simkins, as receiver, surcharged with the fees received from Jones, and the sum of \$56,000, alleged to be the difference between what Prudential bid at the sale and what it received from Proctor.

Undoubtedly a receiver is a fiduciary, and in situations like the present, a trustee, whose obligation extends not only to the mortgagee at whose instance he was appointed, but likewise to the mortgagor or others interested in the equity of redemption. *Cook v. Martin*, 75 Ark. 40; *Shade-*

Wald v. White, 74 Minn. 208; *Jackson v. Smith*, 254 U. S. 586. One occupying a fiduciary relation may not purchase or be interested in the purchase of property for his own benefit against the claims of his beneficiary. Where property is sold by him or under his direction and control, such purchase is voidable at the option of the beneficiary, *Brown v. McGraw*, 98 W. Va. 607, and it is not necessary to show a breach of duty resulting in actual injury. This is upon the principle that no one can serve two masters or be both buyer and seller in the same transaction. *Hoyt v. Latham*, 143 U. S. 553; *Jackson v. Smith*, supra. The rule is, however, subject to this modification,—that where the sale of trust property is made pursuant to a decree of the court, by a special commissioner or other agent appointed by the court, the fiduciary has the right and privilege of purchasing. In such cases the reason for the rule, to wit: a conflict between personal interests and fiduciary duties of the trustee, is absent, so the rule does not apply. *Turner v. Kirkwood*, 49 Fed. (2d) 590 (C. C. A. 10); *Starkweather v. Jenner*, 216 U. S. 524; *Reeves v. Crum*, 97 Ok. 293. This court has recognized and applied such modification of the general principle in *Anderson v. Messinger*, 146 Fed. 929, and Ohio law is not otherwise. *Beckman v. Machinery & Supply Co.*, 9 Ohio App. 275.

[fol. 393] It will be observed that the present receivers were limited in authority and so in obligation. By the terms of their appointment they were authorized to collect the rents and profits from the farms and to operate and manage them; they had no authority to dispose of the real estate; had nothing to do with bringing about the sale and no control over the manner in which it was carried on. They were not in any sense liquidating receivers. Simkins did not stand, in respect to the mortgaged property, in the position of both buyer and seller, nor was anything done by him or those with whom he was associated, to stifle bidding at the sale. It is perfectly clear upon the record that Proctor was not at any time a prospective bidder. Under the decrees, the farms could only be sold separately. Proctor was interested only in the Madison County acreage as a single parcel, and in its purchase only if he could obtain a warranty deed from Prudential. For this he was able and willing to pay. The knowledge of Proctor's interest in the property withheld from Crites could have been of no value to it if disclosed.

The law applicable to situations identical with or analogous to that here considered is fully reviewed in *Turner v. Kirkwood*, supra, and we have neither occasion nor desire to enlarge upon the exhaustive treatment there undertaken. *Jackson v. Smith*, supra, is not *contra*. It is clear that the receiver in that case was a liquidating receiver, and while he did not himself conduct the sale he was the owner of the debt, secured by title to property lodged in a trustee, and as ultimate beneficiary of the trust could and did require a public sale of the security in its extinguishment. He was, therefore, in a practical sense, both buyer and seller. Simkins occupied no such anomalous position. Moreover, *Reeves v. Crum*, supra, points out that in the District of Columbia there is no foreclosure by court action; that deeds of trust are there used, and that in *Jackson v. Smith*, supra, the sale was wholly under the direction of the receiver.

The second of appellant's principal exceptions to the affirmance of the order below, relates to the allowance of credits for attorney fees paid by the receivers to Harrison and Ingalls. It will be recalled that both attorneys represented the plaintiff in the foreclosure proceeding, and that Simkins had, on previous occasions, represented the Prudential. They had agreed among themselves that Simkins was to be appointed receiver and Harrison and Ingalls attorneys, and that they would pool their fees and divide [fol. 394] them equally. In pursuance of the agreement Ingalls paid part of his fee to Simkins. Whether Harrison paid anything or participated in Simkins' fees does not appear. The Master found the fee-splitting arrangement reprehensible, and so do we. The court had no information in respect to it and the agreement invaded its authority to fix the fees of receivers and counsel as their respective contributions to the receivership activities might require.

Moreover, the status of Harrison and Ingalls as attorneys for both plaintiff and receivers, was an anomalous one. Their conflicting loyalties are brought into bold relief by evidence that at one stage of the proceedings Ingalls was obliged to threaten his client, Prudential with contempt for failure to report on an audit of the receivers' accounts, and upon another that Ingalls and Harrison found themselves required to file objections on behalf of their client, Prudential, to the accounts of their clients, the receivers. It is true that Crites has little ground for complaint at this divided allegiance. From the beginning it knew, or should have

known, that Harrison and Ingalls represented opposing interests, and this knowledge gained nothing from later information of the Proctor transaction. It stood by for years doing nothing either to prevent or correct the situation. The importance of this issue, however, transcends the interests of the appellant. It is a circumstance of which a court of equity must take cognizance and may not condone. In *Weil v. Neary*, 278 U. S. 160, the Supreme Court held such fee-splitting contract as was here made, illegal and unenforceable, and in *Woods v. City Nat'l Bank*, 312 U. S. 262, the court denied all compensation except for necessary expenditures actually made to the benefit of the estate where attorneys had dual interests similar to those here involved. This court has dealt similarly with such transactions. *Tracy v. Willys Corp.*, 45 Fed. (2d) 485. The fact that Judge Hough, under a mistaken impression that Prudential was the only party in interest, permitted such double allegiance, is no sanction for the course here followed. The conflict of loyalties did not appear until after his death.

Having in mind, however, that in *Weil v. Neary*, supra, the court did not deny all compensation to attorneys, that Judge Hough, though ignorant of the fee-splitting agreement, knew of the dual allegiance when he allowed Harrison and Ingalls each a preliminary fee of \$250, we sufficiently penalize counsel and vindicate the proprieties when we direct amendment of the order below permitting credit to [fol. 395] the receivers for such preliminary attorney fees and for all out-of-pocket expenses incurred by the attorneys in behalf of the estate, but denying all credits for additional attorney fees to either Harrison or Ingalls.

We find no merit in other exceptions to the receivers' accounts. The items for traveling expenses and stenographic fees appear reasonable and have the sanction of concurrent findings of master and judge. The proofs fail to show negligence or fraud in the operation of the receivership or in the loans made to farmer tenants or in their collection. The order appealed from will be amended as directed, and

As amended **AFFIRMED.**

United States Circuit Court of Appeals**SIXTH CIRCUIT.****No. 9333.**

CRITES, INCORPORATED,
Defendant-Appellant,

vs.

**THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA,**

Plaintiff,

and

**RICHARD SIMKINS AND GEORGE FLORENCE,
RECEIVERS,**

Appellees.

**PETITION FOR RECONSIDERATION AND
REHEARING.**

The receivers are asking a re-consideration and re-hearing on the question of fees to the attorneys for the receivers for the reason of assumptions made and conclusions arrived at as to divided loyalties are not borne

out by the facts in the record. The receivers know that this Honorable Court would not penalize an attorney for performing his duties to his trust. And we want to point out to the court where this court has been misled as to the "dual allegiance", particularly with reference to Ingalls.

The court, on page 6 of its opinion, states that "More over the status of Ingalls and Harrison as attorneys for both the plaintiff and the receivers was an anomalous one and their conflicting loyalties were brought into relief by evidence. On one stage of the proceedings Ingalls threatened his client, the Prudential, with contempt of court for failure to report on the audit of the receivers' accounts. On another that Harrison and Ingalls found themselves required to file objections on behalf of their client, Prudential, to the accounts of their clients, the receivers." The statements, if true, would certainly justify the court in finding that there were "dual interests" in conflict, but these facts are not supported by the record. Ingalls was not threatening his client with contempt of court for failure to report on an audit of the accounts of the receivers, but was citing it for contempt of court for failure to turn over to the court the original first accounts of the receivers, which, due to his lack of knowledge or information as to where the originals were, had been retained by the Prudential for over three years without reporting to the receivers the result of the audit that they were supposed to make.

Secondly, the record shows neither Ingalls nor Harrison did file objections to the accounts of the receivers. This is a very damaging statement to Mr. Ingalls appearing in the court's opinion. We think that the objec-

tions that the court has in mind was the objection of the Prudential to Ingalls' application for fees, which objections appears in (R., 47).

The receivers do not feel that the case of Woods v. City National Bank, 312 U. S., 262, is in point in this case. In that case, the attorneys represented conflicting and hostile interests. It was a bankruptcy case and none of those conflicting interests are involved in this case. The first paragraph of the syllabus says, "under Chapter 10, Bankruptcy Act, the court has plenary power to refuse all fees and expenses." Paragraph two says "that reasonable compensation for services rendered necessarily implies loyal and disinterested services in the interest of those for whom claimant purported to act." The third paragraph says "that no compensation should be allowed for services rendered in connection with a reorganization by a claimant who purports other and conflicting interest."

There is not one iota of evidence that Ingalls was disloyal to his trust, the receivership, nor was his status an anomalous one, on the other hand, he might be considered too zealous in behalf of the trust.

The case of Tracy v. Willys Corporation, (445 Fed. (2nd), 485) is not in point for in that particular case Mr. Tracy stepped out of the case for the purpose of buying the assets. We are satisfied that if Judge Hough had been told of the situation in this case that he would have approved the order for counsel fees based upon the time spent and services rendered to the trust. In addition to 512 hours and 5 days in court for which compensation has been granted by the District Court, Ingalls has

represented the trust in the preparation of the appeal to this court, has prepared the briefs, tried the case and in addition thereto has given the receivers advice and assistance in the preparation of their final closing of this estate.

Let us analyze the relationship between the Prudential Insurance Company and O. C. Ingalls. Mr. Harrison testified that he was called to Columbus by Judge Hough (R., 229). "Judge Hough told me that the receivers were in and had the final report." (R., 230.) The fees of the receivers were fixed by Judge Hough and Harrison, but it is to be noted that at that time and subsequently thereto no application has been made by Davis Harrison for fees from the estate and it can be generally assumed that he was continuing and will continue to look to Prudential for his fees. Had Harrison an agreement to divide fees with Ingalls, he would certainly have fixed a fee for Ingalls also. That as far as the receivers know, there will be no claim filed by Mr. Harrison for any fees in addition to the \$250.00. The order on the attorneys' fees of two hundred fifty dollars were never journalized, nor were the accounts to be found in the files when O. C. Ingalls searched the court records for information concerning the status of the receivership. Judge Hough was ill during a period of this time and it wasn't until Judge Underwood was appointed, did O. C. Ingalls press for information (R., 359). In December, 1935, O. C. Ingalls was advised that the receivers had been paid \$1,800.00 each. When neither the order paying the fees or the accounts themselves were found in the files, Ingalls took the matter up with the receivers

who said they had filed the accounts, but that Prudential had taken the accounts from the court to have them audited, and if they found the accounts to be correct there would be no objections filed by Prudential to the accounts and they could be affirmed. Prudential had had copies of these accounts since April, 1934. The record will show (R., 36) that Ingalls wrote Harrison in October, 1935, asking to have the estate closed. Then followed a series of letters between Ingalls and Harrison, beginning (R., 254) and continuing through to (R., 263), wherein O. C. Ingalls demanded that the Prudential produce the accounts. During that period the record will show from the testimony of Mr. Harrison (R., 240) and (R., 331) that the Prudential thought the receivers' charges were excessive and that that was the reason the accounts had not been filed "and that I would send them back and if necessary file exceptions. I also said that if these expenses could be reduced to some reasonable amount, I would not file exceptions."

Now bear in mind that this attitude of Prudential was reasonable grounds for Florence and Ingalls to become suspicious and to believe that the Prudential was holding the originals and in October, 1936 (R., 36), Ingalls at request of Florence filed a motion to compel the Prudential to show cause why it should not be punished for contempt of court for holding the original copies of the reports and following up this correspondence it was not until January 4, 1937, that Mr. Harrison reported that all he had was copies of the original reports in his possession. Ingalls, as counsel for the receivers, took leave of the court to file copies of the originals in lieu of the origi-

nal reports. Ingalls then filed application for compensation as of February 19, 1937, for \$1,200.00 having in mind that there was only \$1,800.00 in the trust fund.

On June 2, 1937, Prudential filed exceptions to the application of O. C. Ingalls for compensation, stating that the attorney had been paid the sum of \$1,100.00 and that payment was in full for said services. Among the statements made by Mr. Harrison was that Richard Simkins, one of the receivers, had prepared all the reports and other pleadings, which was denied by Simkins and Ingalls in the record. Had Ingalls and Harrison an agreement to divide fees, would he have objected?

Immediately following the filing of the reports and application for confirmation, Crites filed exceptions to the accounts of the receivers. In going over the accounts with the receivers, Ingalls learned that in Cases No. 944 and No. 945 the Prudential had withheld from the receivers approximately \$2,100.00. In No. 945 there was 200 acres of sweet corn at \$1,468.75 which was sold to the Prudential Insurance Company and not paid for. In Case No. 944, there was \$656.25 for the sale of corn to the Prudential for which the Prudential had not paid the receivers. In Case No. 946, a barn was burned and insurance applied by Prudential on its principal and was not taken into consideration in the judgment. In this particular case the property sold for more than the mortgage so this \$2,200.00 belonged to the owner of the equity of redemption. The Prudential, therefore, had \$1,300.00, \$2,100.00 belonging to the receivers and \$2,200.00 belonging to the holders of the equity of redemption, and that might be the reason why the Prudential had wanted

to hold onto the auditing of the receivers' accounts. Any auditor would have very easily seen that the Prudential in Cases No. 944 and No. 945 owed the receivers \$2,100.00, and the receivers would have discovered it in making a final accounting, and this mistake was brought to the attention of the court in the hearing of the exceptions beginning on page (R., 301).

The record will not show this but on May 30, 1938, Ingalls wrote the master, "I have recommended to Davis Harrison that the Prudential pay into the receivers the amounts that were paid to the Prudential Insurance Company, by receivers aggregating \$2,100.00."

On March 28, 1939, Ingalls wrote Simkins, "The master has stated that we must all get together and correct the mistakes in your final accounts so that the only thing to be certified is the question of whether or not there was a breach of trust on your part. To that end, I wish you would make a demand upon Prudential Insurance Company to turn back the two sums in Cases No. 944 and No. 945."

On April 13, 1938, Ingalls wrote Simkins as follows: "Make up a new report on No. 944 and No. 945 amending the reports in the following particulars—in No. 944 show that \$656.25 is due the receivers from Prudential, and in No. 945, show \$1,468.75 due the receivers from Prudential."

On May 28, 1939, the Prudential sent a check for \$2,200.00 to the marshal of the District Court and to Florence and Simkins in the amount of \$2,125.00 to balance the account in Cases No. 944 and No. 945. On February 18, 1939, Ingalls wrote to Harrison and advised

him "That I am going to prepare a new application for fees and ask for an increased allowance in view of the time spent and additional money received in the estate since filing the first application." In this new application for fees, which was filed May 25, 1939, O. C. Ingalls asked for \$2,500.00 which begins in (R., 356) and ends on (R., 364), it was stipulated (R., 386) that the itemization of services attached to the application of O. C. Ingalls need not be printed and they would be contained on the record of appeal (R., 382) and we refer the court to this itemization on file but not printed. Crites on October 10, 1939 (R., 364), filed objections to the allowances, the first branch of the exceptions was "That the time mentioned in this application was consumed in the defense of the activities of the receiver Simkins, applicant's client." It will be noted that the Prudential filed no exceptions to the fees asked. At the bottom of O. C. Ingalls' application for fees, the receivers both state that the services rendered were reasonable and worth the amount requested therein, and it was signed by both receivers.

Appellees designated as contents of record of appeal in addition to the itemization of services by O. C. Ingalls (R., 382) the transcript of testimony taken April 23, 1940, before the court. This transcript of testimony was not included by appellants in the printed record and no objection was made to its omission by appellees because it was considered by them that the attorneys for the receivers was without fault and since the matter was heard by the District Court, with a knowledge of the fee-splitting arrangements before it, it was considered by In-

galls that the allowance of the fee of \$2,200.00 by the court was res. adjudicata.

But for the purpose of this application for rehearing, the receivers are quoting from the record made April 23, 1940. Page 8 on cross examination of George Florence by Crites:

"Q. In other words any legal services that were required by you as receivers were performed for you by Mr. Ingalls? A. That is right."

On page 9, the court asked Mr. Florence "Whether or not Mr. Ingalls of the firm of Ingalls and Selby did all your legal work during that period?" The witness answered "Yes".

Beginning on page 14 to page 20, Mr. Ingalls testified as to the amount of time spent and the nature of the work done. The court, on page 23, inquired of the counsel for Crites, Incorporated, as to their objections to the allowance of \$2,500.00 to O. C. Ingalls, asked Crites to state their position for opposing the allowance. The answer was that the substantial amount of fees Ingalls asked for time spent in the court was spend defending the receivers' accounts. That the real reason for filing objections was that the Jones-Proctor deal was in the background.

23A:

"The Court: Are you charging those mistakes to Mr. Ingalls?"

A. No, we are charging them to his client he had to defend. He was defending his client's obvious mistake. I do not want to charge Mr. Ingalls with any participation in the Jones-Proctor deal. I do not think he had anything to do with it."

On page 25:

"The Court: You deny, Mr. Ingalls, that you participated in any manner with Simkins?"

A. Absolutely.

The Court: Is this the relationship which counsel for the respondents indicate was an untimely alliance?

A. There is no contention that Mr. Ingalls was ever connected with that.

The Court: Then just what is Mr. Ingalls connected with in the relationship which you allege as to Mr. Simkins?

A. That the difficulty in the Jones-Proctor matter was the primary reason for those objections to the accounts which occasioned Mr. Simkins' defense."

On page 31, the court asked the counsel for Crites:

"If Mr. Ingalls, by his application of May 25, 1939, for fees, had removed any of the objectionable features which the master called his attention to when the matter was before him?"

A. The master's objection to Mr. Ingalls' statement was that it included some work he had done for the Prudential.

The Court: Then your objection would not be tenable as to this objection?

A. That is right.

The Court: Mr. Ingalls in compliance with the report of the master, has corrected his application until it shows only those charges for services which were rendered to the estate?

A. That is right."

This will show to this court that the District Court was aware of the dual interests in the matter and heard Mr. Florence say that Mr. Ingalls was the only attorney who had represented the interests of the receivers, and heard Crites admit that the work done by Mr. Ingalls

was in behalf of the receivers, and made an allowance. This allowance was for a total of 512 hours in addition to 5 days spent in court. There was not enough money in the estate to pay this fee and other costs, so the court orders the Prudential to pay the receivers about \$1,300.00 to make up enough to pay the fee as will be explained in the second paragraph below.

At this same hearing, on page 9, W. T. Joseph, a member of the Columbus bar, testified that the services of Mr. Ingalls were reasonably worth a fee of \$5,000.00. And a statement from Barton Griffith, Junior, admitted by stipulation that the services of Mr. Ingalls were worth a fee in excess of \$5,000.00. And we are satisfied that if Crites were to appear in this matter, it would admit that Ingalls had always acted in the interests of the receivers.

Even Crites admitted this in this hearing and in their brief, opposing the allowance of the full amount of compensation, that O. C. Ingalls as attorney for receivers was entitled to compensation. In order to pay the fees to O. C. Ingalls as attorney for receivers and other costs, the clerk was ordered to pay to the receivers all the deposits for costs made by the Prudential not required by the clerk for payment for other costs, in the cases, amounting to \$537.18, and the Prudential was directed to pay to the receivers the sum of \$782.52 additional required to pay the balance of said deficiency. And in Ingalls' application for fees, there was cited (R., 362) Ohio law and general law, wherein funds, in the trust estate are insufficient to pay the costs, the usual rule is that the person that brings the action must pay.

Note that (R., 368) order was approved consolidating cases, "approved O. C. Ingalls as attorney for receivers" and "Harrison as attorney for Prudential." Also note that on (R., 370) motion to retax costs—signed Harrison for Prudential and Ingalls & Warnick for the receivers.

The appearances in this court show both counsel appearing for Prudential and receivers. Prudential is really not an active party in this appeal; appellants made it party and counsel for receivers and plaintiff formally appeared for both, but the defense was wholly in behalf of the trust.

On October 29, 1939, Ingalls wrote Judge Underwood, "If the court should find and approve the report of the master commissioner, the costs should be assessed against Crites in all cases except No. 944 and No. 945. In my opinion the costs of these two cases should be taxed against the Prudential Life Insurance Company."

The appellants are insisting that there was an unholy agreement between Simkins, Harrison and Ingalls, whereby there was to be a division of fees among them. And that Simkins was to be receiver and Harrison and Ingalls counsel for the receivers. The master found that there was a mutual understanding between the parties referred to by which it was agreed that they should be proposed for appointment as alleged but he did not find that there was any other agreement for the sharing of fees between the three. There is no doubt but what there was an agreement between Simkins and Ingalls to divide fees, but there is no place in the record where Harrison agreed to divide fees with anyone. As a matter of fact, in his arguments before this court in February,

he said he had made no arrangements whatsoever to divide fees and that the money paid him one and one-half years after entering the case was money received by Simkins from Jones and was paid to Harrison for compensation to him for work done in a law suit in Indiana for Simkins (R., 223). Simkins (R., 143) testified that he did not receive any fees from any other party interested in the foreclosure proceedings.

The testimony of April 23, Ingalls, on page 14, says that Simkins approached him and asked him to join with Harrison as counsel for the Prudential and asked one-half of the compensation. Ingalls demurred at first and said that one-third of the compensation was the usual division between attorneys, based upon services rendered. Simkins stated that he expected to be appointed receiver and that the fees would practically be the same and suggested one-half which was consented to. Ingalls paid one-half of the \$1,100.00 received from the Prudential to Simkins. Simkins had the right to assume that the receivers' fees and the attorneys' fees would be comparable, from experience in the past.

There was never any division made out of the money coming out of the trust nor any attempt to divide such funds made. Simkins never offered to divide the \$1,800.00 with Ingalls, nor did Ingalls offer to divide with Simkins the \$2,200.00 paid by the court. This agreement in no sense invaded the authority of the court to fix the fees of the receivers and counsel, which practice was found objectionable in the case of Weil v. Nearing, 278 U. S., 160. In the Weil case, there was a contract between the attorney for the trustees and the attorney for

the creditors, Untermeyer, whereby the compensation to be allowed the former for his services as attorney for the trustees shall be performed under the latter's supervision. This contrary to public policy and professional ethics. Of course this was a bankruptcy case and the contract would be void under Rule 42 of that act.

Corpus Juris Secundum, Volume 7, page 1034, says that it is not unethical or illegal for one attorney to divide fees with another attorney except agreements against public policy and bankruptcy agreements. There was no "dual alliance" in the relationship between Ingalls and Simkins. The master did not find the fee-splitting arrangements reprehensible, but stated to that extent, this court and Judge Hough were imposed upon, but the present District Court was not imposed upon because it made a reasonable allowance to Ingalls after a thorough investigation into the situation. The master in (P., 94) found that Ingalls' first application for fees included items for services rendered to Prudential. In his second application, which was allowed by the court, these items were struck out and Crites admits that there were no items for services rendered to Prudential in the last allowance by the court.

Crites, in their brief, page 18, states that the Jones-Proctor transaction was concealed from Judge Hough, Ingalls and Mr. Florence.

In conclusion, we want to call the court's attention to the fact that there was an order in this case appointing Ingalls and Harrison counsel. It appears in the order of March 3, 1932 (R., 13). It is the conclusion and hope of the receivers that the court after reading this appli-

cation for reconsideration and rehearing should let its own record, rewrite its opinion, leaving out all that opinion adverse to the attorneys for the receivers, without the necessity of a formal hearing in the matter, but if the court wants it to be heard, the receivers will present the matter to the court.

Out of fairness to the counsel in this case, Judge Hough appointed Harrison to watch the Prudential's end of this case as attorney for receivers and he appointed Ingalls to advise Simkins and Florence. Harrison was just as zealous in his efforts to protect Prudential all the way through as was Ingalls to protect the receivers. And if the court follows this memorandum, reexamines the record, it will find clearly, that there was no "dual interests" involved. No "dual interests" such as were found in Woods against City National Bank. Judge Underwood did not find the so-called fee-splitting arrangement illegal and after hearing and seeing witnesses, decided that Ingalls was entitled to compensation for representing the receivers, and he made the Prudential pay a big part of Ingalls' fee.

Stuart v. Boulware, 133 U. S., 78.

Allowances to receiver and counsel are largely discretionary and the action of the court below, in this respect is treated by appellate court as presumably correct. See Trustees v. Grenough, 105 U. S., 527, 537, where this subject is discussed.

We, therefore, submit that the court should reconsider and correct their opinion in conformity with the record of this case, and remove counsel from the disapproval that the court has found.

And if the court can consistently revise its opinion and order without the necessity of a rehearing, your receivers will be very grateful.

All of which is respectfully submitted.

Richard Simkins,
George Florence,
Receivers.

We certify that this petition for rehearing is not filed for delay and is offered in utmost good faith.

O. C. INGALLS,
DAVIS HARRISON,
Attorneys for Receivers.

No. 9333

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CRITES, INCORPORATED,

Defendant-Appellant.

vs.

**THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, Plaintiff.**

AND

RICHARD SIMKINS AND GEORGE FLORENCE,

Receivers.

Appellees.

CIVIL NO. 327.

APPEAL FROM

THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Petition for Rehearing.

HAFFENBERG & ROSENBAUM,
100 W. Monroe Street,
Chicago, Illinois;

ARMOUR, WRIGHT, PURBUS & HARTZ,
Huntington Bank Bldg.,
Columbus, Ohio.

Attorneys for Defendant-Appellant.

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 9333

CRITES, INCORPORATED,
Defendant-Appellant,
vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, *Plaintiff,*

AND

RICHARD SIMKINS AND GEORGE FLORENCE,
Receivers,
Appellees.

CIVIL NO. 927.

APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Petition for Rehearing.

*To the Honorable Justices of the United States Circuit
Court of Appeals, for the Sixth Circuit:*

Now comes the appellant, Crites, Incorporated, a corporation, by its attorneys, Haffenberg & Rosenbaum, and Arnold, Wright, Purpus & Harlor, and respectfully presents this, its petition for rehearing of the above entitled

cause, respectfully prays that a rehearing be granted in said cause, and submits the following reasons and grounds therefor:

I.

We respectfully submit, judging from the opinion, that the Court has rested its judgment on the sole principle that a fiduciary may become a purchaser at a public judicial sale, relying on the authority of *Turner v. Kirkwood*, 49 F. (2) 590; *Starkweather v. Jenner*, 216 U. S. 524, and *Reeves v. Crum*, 97 Okla. 293.

This, however, does not fully decide the case.

We believe this Court has omitted to consider, as a *matter of law*, the effect of the admitted wrongful conduct of Simkins and the breach by him of his related duties as a fiduciary upon such right to bid at public sale. Such question is of equal importance, and upon its determination, too, rests the decision of this case. This was recognized by this Court in *Anderson v. Messinger*, 146 Fed. 929, 932.

This Court has accepted the premise that Simkins was a fiduciary and in this case "a trustee, whose obligation extend not only to the mortgagee at whose instance he was appointed, but likewise to the mortgagor or others interested in the equity of redemption."

From this premise it necessarily followed that the trustee owed duties: to administer the trust solely in the interest of the beneficiary; in dealing with the beneficiary on the trustee's own account . . . to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know; not to enter into a substantial competition with the interest of the beneficiary; not to be guided by the interest of any third person; to communicate to the beneficiary material facts affecting the interest of the beneficiary

which he knows the beneficiary needs to know for his protection in dealing with a third person with respect to his interest; and to deal impartially. We also pointed out that non-disclosure by a fiduciary was the equivalent of a fraudulent misrepresentation (our brief, pp. 14-20).

These principles were conceded by appellees (their brief, p. 3).

By his employment and by the course pursued prior to the Marshal's sale, Simkins made it to his personal gain to assist the Prudential Insurance Company in acquiring all eleven Madison County farms, knowing all the while that Proctor was then desirous of purchasing, and willing and able to purchase, these farms for an amount in excess of Prudential's mortgage, interest and costs. He concealed this information and his personal interest from the Court, his co-receiver and Crites, Inc. Both Simkins and Prudential fully realized and intended that the failure to reveal this information would enable Prudential to bid in all the property at the Marshal's sale as cheaply as possible and thereby, establish not only a deficiency, but realize an unwarranted profit as well.

If this judgment is to remain and dispense with the receiver's good faith and fair play, need we add that in cases involving foreclosure receiverships a dangerous precedent has been set.

Good faith and fair play are not here present. The Master's finding (R. 103) "that the conduct of receiver Simkins was objectionable in that it was open to, and did cause, criticism which, as an officer of this Court it was his duty to avoid;" certainly rebuts any theory of good faith on Simkins' part. Nor has Simkins endeavored to maintain or establish his good faith in these proceedings.

The Court will observe that the duties exist by virtue of the fiduciary relation and are independent,—entirely

so,—of any right of the fiduciary to purchase the trust *res* at a public judicial sale, and these duties are obliged to be performed as well. This Court's own citations lead this out.

In *Starkweather v. Jenner*, 216 U. S. 524, good faith was not found lacking. The facts are not parallel. The Court recognized that a tenant in common, although in a fiduciary character, had a proprietary interest to protect and could purchase at a judicial sale "all deceit and fraud out of the way."

After recognizing that a trustee was "competent to purchase the trust property at a judicial sale which he has no interest in, nor any part in bringing about, and which sale he in no way controls," the Supreme Court immediately continued with the following (p. 529):

"But it is said that if there is no absolute prohibition upon one co-owner buying at an open sale of the common property to satisfy a mortgage or other encumbrance thereon, that at least the fiduciary character and common interest due to such a co-tenancy require of one who buys the utmost fairness of conduct. *Concede this.*"

In discussing the facts the Court concluded (p. 529):

"In such circumstances it was plainly the right of each one to take care of himself, and, if he saw fit to buy at the trust sale on the chance of making something, he was free to do so, *provided only he took no undue or unfair advantage of his co-owners*, and observed the rules concerning fairness at such a sale, which prevail in any circumstances."

It was implicit in the opinion of the Supreme Court in that case that, while the tenant in common could bid at a judicial sale, his right to do so was conditioned on the "utmost fairness of conduct."

Turner v. Kirkwood, 49 F. (2) 590, likewise applied this principle. There the administrator had a proprietary

interest in the security being foreclosed and was also personally liable on the indebtedness which in that case exceeded the value of the security.

Nevertheless, and notwithstanding that he purchased from the mortgagee who had acquired the whole of the security by purchase at a public judicial sale, the administrator was held to account to the next of kin for the value of her share of that part of the security to which the foreclosure had been extended.

Obviously, the purchase alone at the judicial sale did not suffice to relieve that fiduciary of all liability.

In *Reeves v. Crum*, 97 Okla. 293, only the abstract question was raised and answered, whether the status alone of the receiver disqualified him; and the Court's opinion was expressly limited to that. It was decided without the question of the receiver's good faith or conduct being injected into the case, either by the pleadings or the argument. Will this Court surmise that the judgment of the Oklahoma Supreme Court would have been the same, if lack of good faith had there been in issue?

Anderson v. Messinger, 146 Fed. 929, involved a purchase by a pledgee who likewise had a proprietary interest to protect. This Court there also noted the distinction above made when it also said at page 932:

"In either of the last stated instances, the sale would be voidable if the purchaser were guilty of any fraud or other wrongful practice in the transaction;

• • •

Beckman v. Machinery & Supply Co., 9 Oh. App. 275, has no relevance, as the transaction was initiated by the receiver with the purchaser after the foreclosure sale had been confirmed.

That a receiver has a right to buy at a public judicial sale is still no answer here. The appellees did not here deny

the other fiduciary obligations of the receiver. We pointed this out on page 13 of our reply brief where we stated:

"In conclusion, we respectfully submit the appellees fail utterly to argue the obligation of the receiver to make full disclosure, to be loyal and to be impartial in advance of the foreclosure sale,—at a time when the appellant would still have been in a position to have salvaged the value of its equity of redemption,—and fail to note that in this case these farms were worth, and a buyer was available at a price, in excess of the mortgage, interest and costs."

It is essential that, whatever be the right he exercises, a fiduciary also fulfill *all* of his fiduciary obligations. There is a breach of trust, if a fiduciary fails in any one duty. It is not enough that a fiduciary exercise a right.

The obligation on Simkins' part to make disclosure clearly existed, and this the Court recognizes, when it says he is a trustee. He made no disclosure. That fact is conceded.

This Court is in error when it said in its opinion (pp. 3-4) that "*while Simkins had told Judge Hough in the presence of the attorney for the appellant, that he knew of a prospective buyer for the whole tract he neither identified the buyer nor the price he was willing to pay, either to the Court or to the appellant.*" The italicized part is an error. There is no testimony in the record that Mr. Harlor or any counsel of Crites, Inc. was present at any such conference between Simkins and the Court (R. 146, reply brief, pp. 8, 9). And it is certainly not pretended that Simkins at any time disclosed his personal interest.

The record is also that appellant was organized to salvage H. M. Crites' "assets" (R. 110, 134), not the farms alone, as the Court's opinion (p. 2) implies.

The opinion does not decide whether, as a matter of law, it was Simkins' duty to make disclosure and to act im-

partially, and nowhere discusses whether these duties were fulfilled and liability attached for their non-fulfillment and whether these had any bearing on Simkins' right to be a purchaser at the Marshal's sale.

II.

This Court observed that Simkins and Ingalls had their agreement to divide all fees earned as receiver and as attorney for mortgagee and receiver, which agreement this Court branded "reprehensible." The record shows (R. 12, 13) that the Court below authorized Harrison and Ingalls' appointment as attorneys for the receivers by its order, on the receivers' *ex parte* application, entered less than 20 days after the filing of the foreclosure suits. This Court's opinion is in error in stating (p. 2) that no such order appears of record.

What the Court has overlooked is that Simkins, as far as the Court below and Crites, Inc. were concerned, was a stranger to the record and not disqualified to act as receiver. Who his attorneys were and what was their relation to the parties litigant would not absolve him, Simkins, from not fulfilling his fiduciary obligations and would not put parties on notice that he, Simkins, would have conflicting loyalties and violate his duties. Florence, the co-receiver, with the same attorneys did not.

Simkins' agreement with Ingalls did not come to light until the hearings on the accounts and necessarily remained concealed from the Court as well as Crites, Inc., during the time of the occurrence of all of these transactions. This Court does not mention, and it may have been overlooked, that the fees, divided with Simkins by Ingalls very early in the foreclosure pursuant to their reprehensible agreement, were fees paid by Prudential to Ingalls as its attorneys (R. 112-113, 279). Simkins' interest, from

a monetary standpoint, lay throughout, therefore, with the plaintiff; and by accepting a share in Ingalls' retainer as plaintiff's attorney, *Simkins'* impartiality was utterly destroyed and influenced.

The fee-splitting agreement would have to be reprehensible no less with *Simkins* than with *Ingalls*, who alone is penalized. Actually it was more so, for the corrupting influence of the concealed fee-splitting agreement possessed *Simkins* and also impelled him to act as he did in the *Proctor* transaction in bad faith.

III.

On pages 20 and 9 of our original brief, and at page 2 of our reply brief, we pointed out that the agreement *Simkins* negotiated for *Jones* and for which he was paid also called for the sale of the receivers' half interest in the growing crops at that time in his custody as receiver (R. 62). The consideration was entire; and it is inescapable that *Simkins* was being paid to accomplish the sale,—not of the farms alone,—but of the farms with the growing crops. The contract was entire for one expressed consideration, and the value of the interest in the growing crops was not inconsequential (R. 19).

The Court in its opinion makes no mention of this. Isn't this a factor involving a breach of trust? If *Simkins* had bid at the sale openly, he could not have acquired the interest in the growing crops; and this, we think, the Court will concede on reconsideration.

IV.

The Court in its opinion (p. 5) also says, "The knowledge of *Proctor's* interest in the property withheld from *Crites* would have been of no value to it if disclosed."

The Court has misconceived the facts in stating (p. 4), "\$56,000, alleged to be the difference between what Prudential bid at the sale and what it received from Proctor."

The price Proctor was willing to pay was in excess of the mortgage indebtedness by \$56,000, notwithstanding such distressing times. The deficiency between the bid and the indebtedness amounted to an additional \$64,600 (R. 31, 32). The mortgage, interest and indebtedness as adjudged aggregated only \$224,000 (R. 25, 26). The values of these farms were in excess of the adjudicated mortgage indebtedness (R. 26). This same Jones, only two years earlier, had offered Henry Crites \$500,000 for these very farms in behalf of a wealthy New York client (R. 201-2).

At the time of the negotiations between Proctor and Prudential, prior to the Marshal's sale, Crites was the only party in a position to make delivery of the entire tract of eleven farms.

There is nothing to show that Proctor would not have dealt with Crites, Inc. and accepted its deed with a title guarantee policy, if the opportunity had been afforded it.

Had the parties acted in good faith, been fair and above-board, and disclosed the matter to Crites, Inc., there was nothing to prevent the consummation of the transaction between Prudential and Proctor in the form it took. There is nothing in this record to show why a deed from Crites, Inc. could not have been executed to Prudential so that Prudential could have given Proctor its general warranty deed, or that there were any title difficulties or that a title guarantee policy could not have been furnished.

In any event, the receiver's obligations to be impartial and to make disclosure existed. The values, too, were there. Appellant's opportunity to deal with Proctor before the Marshal's sale was lost, and with it those values. The

receiver by his concealment intended the result. He enjoyed a share in the consequent profit. His duties were breached.

Are the equities to be resolved in favor of one who, to the injury of a party litigant, does not make disclosure when he is under such duty to disclose?

WHEREFORE your petitioner respectfully prays that a rehearing be granted, this case restored to the docket and a reargument ordered.

Respectfully,

HAFFENBERG & ROSENBAUM,
ARNOLD, WRIGHT, PURPUS & HARLOR,
*Attorneys for Crites, Incorporated,
Petitioner.*

The undersigned members of the bar of this Honorable Court certify that the foregoing petition is presented in good faith, is in their opinion well founded, and is not made for purpose of delay.

JOSEPH ROSENBAUM

EARL F. MORRIS

[fol. 400] ORDER DENYING PETITIONS FOR REHEARING—
Entered June 3, 1943

Upon consideration of the petitions for rehearing filed on behalf both of the appellant and certain of the appellees, and upon a review of the briefs in support thereof, and the original record,

It Is Ordered that each of the said petitions be and it is hereby denied.

[fol. 401] Clerk's Certificate to foregoing transcript omitted in printing.

(7151)

[fol. 424] [Stamp:] Office of the Clerk, Supreme Court,
U. S., Aug. 20, 1943.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1943

No. —

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner

vs.

H. M. CRITES, et al.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 4th, 1943.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of August, 1943.

[fol. 425] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 317

Office

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

CRITES, INCORPORATED,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
RICHARD SIMKINS, GEORGE FLORENCE,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS, FOR THE SIXTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF.**

ISAAC E. FERGUSON,
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Chicago, 2, Illinois,

Counsel for Petitioner.

Of Counsel:

NATHAN HAFFENBERG,
JOSEPH ROSENBAUM,
100 W. Monroe St.,
Chicago, Illinois.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. _____

CRITES, INCORPORATED,

vs.

Petitioner,

**PRUDENTIAL INSURANCE COMPANY OF AMERICA,
RICHARD SIMKINS, GEORGE FLORENCE,**
Respondents.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Crites, Incorporated, an Ohio corporation, respectfully shows to this honorable court:

(A)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The opinion of the circuit court of appeals (R. 387-393) is reported in the advance sheets, 134 F. (2) 925.

The controversy which the petitioner now brings to this court had its origin in eleven consolidated foreclosure suits, involving eleven adjoining farms in Madison County,

Ohio, brought by Prudential Insurance Company of America against petitioner. Richard Simkins and George Florence were appointed co-receivers of the mortgaged farms and the petitioner now complains of the conduct of the receiver Simkins in connection with the foreclosure sale.

The indebtedness on the eleven mortgages aggregated \$223,742.32 (R. 25-26) and the decrees of foreclosure provided that the farms should be sold at a minimum bid of two-thirds of the appraised value (R. 25, 26). The appraisers appointed by the marshal fixed the value at \$244,080 (R. 26), or \$20,337.68 in excess of the mortgage indebtedness. However, after postponement of the sale for more than a year ostensibly to await a better market (R. 128), Prudential bid in the mortgaged farms at minimum bid of \$164,000 (R. 32) and then took a deficiency decree for \$64,000 (R. 31-32). As afterwards learned by the petitioner, when Prudential took its deficiency decree it already had in hand a contract for the sale of the farms—*procured by the receiver Simkins before the foreclosure sales*—at \$249,000 cash, or \$25,000 more than the entire mortgage indebtedness (R. 288, 289, 61-3, 154-5).

The ultimate purchaser of the farms was William Proctor, a stranger to the foreclosure proceedings. His agent in the transaction was E. F. Jones. Unknown to the court, or to the co-receiver, or to the petitioner, Simkins entered into a contract of employment with Jones under which Simkins was to procure the farms for Jones' principal, William Proctor, and Jones was to pay Simkins a share of his commissions (R. 147, 206-7). Pursuant to his secret deal with Jones, Simkins negotiated a written agreement with Prudential, contingent upon acquisition of title by Prudential at the impending foreclosure sale, for sale to Jones of the eleven farms plus the receivers' one-half interest in the growing crops at cash price of \$249,

000 (R. 288, 61-3, 154-5). Earnest money was deposited on this agreement in the sum of \$3,000 (R. 212).

The reason why Jones sought the cooperation of the receiver Simkins, rather than to bargain directly with the owner of the equity, may be traced to the fact that only two years previously Jones had made an offer for these same farms, on behalf of another client, of \$500,000 and this offer had been rejected (R. 201-202).

Immediately upon confirmation of the marshal's sale to Prudential, the mortgagee conveyed the eleven farms to Mary Johnston as Proctor's nominee (R. 312, 325). The deed carried revenue stamps indicating a consideration of \$281,000, which was \$117,000 more than Prudential's bid at the foreclosure sale and \$56,000 more than the mortgage indebtedness. Jones received from Proctor one commission check for \$15,000 and another of approximately \$10,000 (R. 219). Jones paid Simkins some \$2,797 (R. 273-4), and Simkins paid Harrison, then acting as counsel for Prudential as well as the co-receivers, \$500 (R. 274).

In addition to his side deal with Jones, Simkins had fee-splitting agreements with Ingalls and Harrison, co-counsel for the plaintiff. On the eve of the filing of the foreclosure suits, Simkins and Ingalls agreed between themselves that Simkins should be appointed receiver, that Ingalls and Harrison would become counsel for the receiver as well as for the plaintiff, and that Simkins and Ingalls would split fees (R. 109, 113, 223). Shortly after the commencement of the suits, the court entered an order on the receivers' *ex parte* application appointing Ingalls and Harrison as attorneys for the receivers (R. 12-13). The opinion of the circuit court of appeals is obviously in error in stating that no such order was entered (R. 388-389). Ingalls received \$1100 as a retainer from Prudential and split this fee with Simkins (R. 112, 279). When Simkins received his compensation from Jones, on the

4
sale of the farms by Prudential to Proctor, he paid part of this compensation to Harrison (R. 274).

There is no explanation of the difference between the contract price of \$249,000 and the actual sale price of \$281,000, although it seems inferable that the difference of approximately \$32,000 represents commissions and expenses paid by the buyer.

To the receivers' amended accounts, the petitioner filed exceptions seeking to surcharge Simkins with the secret commissions received from Jones, with the amount of Jones' profit, and with the amount of the loss to the petitioner of the value of its equity caused by Simkins' breaches of trust in concert with Prudential and Jones. The petitioner also objected to the credits taken by Simkins in the accounting as compensation for his own services (R. 50-63).

The district court consolidated the causes as one (R. 367-8) and in substance concluded as a matter of law "that the conduct of receiver Simkins was objectionable in that it was open to, and did cause, criticism which, as an officer of this court, it was his duty to avoid" but constituted no breach of duty or misconduct to justify his surcharge or the disallowance of his credits objected to (R. 103), and, hence, overruled petitioner's objections to the special master's report, adopted the master's findings of fact and conclusions of law, approved the amended accounts, and dismissed the petitioner's exceptions for want of equity (R. 371-2).

The circuit court of appeals, on appeal, amended the order by disallowing the compensation granted to Ingalls by the district court and affirmed the order as amended (R. 387, 393). While it branded the agreement between Simkins and Ingalls as reprehensible (R. 392), it did not require Simkins to repay any part of the money he had received and retained as receiver's compensation. Petitions for rehearing were denied (R. 423).

(B)

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by Section 240(a) of the Judicial Code as amended by Act of Feb. 13, 1925 (28 U. S. C., Sec. 347(a)), making it competent for this court on the petition of any party in any civil case in a circuit court of appeals to require by certiorari after judgment of such court that the cause be certified to this court for determination by it with the same power and authority and with like effect as if the cause had been brought by unrestricted appeal.

The judgment of the circuit court of appeals for the sixth circuit, amending and, as so amended, affirming the order of the district court appealed from, was entered April 12, 1943 (R. 387).

Petitions for rehearing were filed in due time and upon consideration all were, on June 3, 1943, denied (R. 423). This petition is filed within three months thereafter as prescribed by the Act of Feb. 13, 1925, Ch. 229, Sec. 8, 43 Stat. 940 (28 U. S. C., Sec. 350), and *Bowman v. Lopereno*, 311 U. S. 262, 266, and cases therein cited.

(C)

QUESTIONS PRESENTED.

(1) May a receiver, pending the sales of farm property in his custody under foreclosure proceedings in a district court, secretly represent and be paid by a prospective purchaser in purchasing such property for him from the plaintiff, the mortgagee, for a cash price in excess of the mortgage encumbrance, without making disclosure to the court or the owner of the equity of redemption of all material facts?

(2) If the receiver thereby be guilty of breach of his trust, is he (a) entitled to compensation for his services as receiver, and (b) is he accountable for the secret compensation paid him by his employer, or the profits gained by him and his associates, or the loss to the petitioner of the amount of the consideration paid, or at least of the appraised value of the property, in excess of the amount of the adjudicated mortgage encumbrance?

(3) Is a receiver entitled to any compensation as receiver, where he has entered into a secret agreement with plaintiff's attorney in advance of suit for a division of all fees they both might receive?

The district court at Columbus, Ohio, and the circuit court of appeals for the sixth circuit answered these questions adversely to the petitioner.

(D)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The questions presented are of paramount importance in the administration of receiverships whenever resorted to in civil actions in the United States district courts. Unless the decisions below be reviewed and corrected, the integrity of receiverships in such proceedings is impugned.

(2) The application of the principles underlying *Jackson v. Smith*, 254 U. S. 586, which were disregarded by the courts below, would probably lead to a different result.

(3) Otherwise, the circuit court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or, has so far sanctioned a departure by the district court from the accepted or usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(E)

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the sixth circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9333, *Crites, Incorporated, Appellant v. Prudential Insurance Company of America and Richard Simkins and George Florence, as co-receivers, Appellees*, and that the said judgment of the United States circuit court of appeals for the sixth circuit may be reversed by this honorable court, and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioner will ever pray.

CRITES, INCORPORATED

By ISAAC E. FERGUSON,

Counsel for Petitioner.

NATHAN HAFFENBERG

JOSEPH ROSENBAUM

Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion (R. 387-393) of the United States circuit court of appeals for the sixth circuit is reported in the advance sheets in *Crites, Inc. v. Prudential Insurance Co. of America, et al.*, 134 F. (2) 925.

II.

STATEMENT OF THE CASE.

The material facts with reference to the origin and history of the case, jurisdiction and the issues and questions presented have been stated in the preceding petition.

III.

SPECIFICATION OF ERRORS TO BE URGED.

(1) The circuit court of appeals erred in affirming the order of the district court as modified.

(2) The circuit court of appeals erred in not reversing the order of the district court with directions to surcharge the receiver Simkins with the amount of moneys Simkins received as compensation from Jones, with the amount of the profits or commissions paid to Jones, and with the amount of the price paid by Proctor for the eleven Madison County farms, in excess of the decretal indebtedness, or at least their appraised value in excess of such indebtedness.

(3) The circuit court of appeals also erred in not reversing and directing that credit to the receivers for compensation to Simkins for his services as receiver be disallowed and that Simkins repay into court the moneys paid to or retained by him therefor.

IV.

ARGUMENT.

(A)

The questions presented are of paramount importance in the administration of receiverships whenever resorted to in civil actions in the United States district courts. Unless the decisions below be reviewed and corrected, the integrity of receiverships in such proceedings is impugned.

The questions here involved will call for this honorable court's authoritative pronouncement,—nationwide in effect and scope,—of the extent of the fiduciary obligations and the consequent liability for a breach thereof by one occupying a federal office, namely, a receiver appointed in a mortgage foreclosure proceedings by a district court of the United States in the exercise of its jurisdiction and authority under the Constitution and laws of the United States. Compare *Texas & P. Ry. Co. v. Cox*, 145 U.S. 593, 603; *Ex Parte Tyler*, 149 U.S. 164; *Gillis v. State of California*, 293 U.S. 62, 65.

Since there is no federal statute determinative of the subject, general equitable principles, as determined by this court, will govern, similarly as in *U. S. v. Howard*, 302 U.S. 445, where, because of the question's importance, certiorari was granted to determine the official duty of a receiver with respect to his choice of depositories for moneys belonging to a fiduciary estate.

According to the decisions below, as long as the receiver is not charged with its sale, he is free to secretly serve strangers in their acquisition of property in his custody and to bargain for and receive an independent compensation for his efforts.

It would be unseemly not to require of a receiver, as an officer and arm of the court appointing him, like high standards, complete impartiality and full and frank disclosure of all material facts to all parties litigant as was required of fiduciaries by this court in *American United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, *Woods v. City National Bank v. Trust Co. of Chicago*, 312 U.S. 262 and *Pepper v. Litton*, 308 U.S. 238.

(B)

The application of the principles underlying *Jackson v. Smith*, 254 U.S. 586, which were disregarded by the courts below, would probably lead to a different result.

When decisions of the courts below have disregarded principles established by this court, certiorari has been granted. See *Fisher v. United Life Ins. Co.*, 314 U.S. 549 and *Helvering v. Horst*, 311 U.S. 112, 114, and compare *Armour & Co. v. Ft. Morgan S.S. Co.*, 207 U.S. 253, 257.

In *Jackson v. Smith*, 254 U.S. 586, a note secured by a trust deed was among the assets of an equity receivership administered in the District of Columbia supreme (now district) court. The receiver requested the trustee under power of sale in the trust deed to foreclose the real estate security. At the public sale conducted under the trustee's supervision by an auctioneer, the receiver's associates over competition purchased the property pursuant to an agreement to share the profits with him. This was held to be a violation of the receiver's fiduciary obligation; and the receiver's accounts were charged with the profits later realized, and judgment as at law also rendered against the receiver's associates therefor. On appeal, the judgment was reversed, 48 D.C. App. 565.

The court of appeals, like the court below in the case at bar, rested its decision on a lack of duty with respect to the conduct of the public sale (p. 577).

On certiorari to this court, the judgment of the court of appeals was reversed and that of the supreme court affirmed.

In *Jackson v. Smith* the receiver was not the seller at the public sale. That the sale there was one under a power in a trust deed and not a judicial sale is also no point of distinction, for in *Starkweather v. Jenner*, 216 U.S. 524 (the only case in this court relied on by the court below in support of its decision), this court expressly held (p. 528) no such distinction existed.

The emphasis of the court below on judicial sales, we respectfully submit, discloses an erroneous conception of the law,—for it is not the character of the sale which determines the fiduciary's right or the propriety of his conduct, but rather the *absence* of a conflicting duty.

In *Re Marquette Manor Bldg. Corporation*, 97 F. (2) 733, certiorari denied *sub nom. The National Builders Bank of Chicago v. Brown*, 305 U.S. 648, the circuit court of appeals for the seventh circuit followed *Jackson v. Smith* and applied its salutary principle to a bank acting as a depository. The decision of the court below is in direct conflict with it in principle.

The point in *Jackson v. Smith*, as in the case at bar, is that a conflict of personal interest with a fiduciary duty was created. Such was the situation with Simkins.

Had the courts below given weight to *Jackson v. Smith* and the principles there enunciated, they would have denounced Simkins' dealings and his acceptance of employment and compensation from Jones, agent of the prospective purchaser, as being in conflict with a receiver's duties of impartiality, loyalty and disclosure.

(C)

Otherwise, the circuit court of appeals has decided an important question of federal law which has not been but should be, settled by this court, or, has so far sanctioned a departure by the district court from the accepted or usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

This court has had a similar question before it on but two occasions, namely, in *Baker v. Schofield*, 243 U.S. 114 and *Jackson v. Smith*, 254 U.S. 586. In the former the receiver conducted the sale, in the latter the sale was conducted by an impartial trustee. The result was nevertheless the same in both cases, liability was imposed because of the receivers' improper conduct.

The weight of authority condemns Simkins' dealings and is opposed to the decisions of the courts below. *Cook v. Martin*, 75 Ark. 40, 45-47 (rehearing granted on other grounds); *Herrick v. Müller*, 123 Ind. 304; *Re Sheets Lumber Co.*, 52 La. Ann. 1337; *Donahue v. Quackenbush*, 62 Minn. 132, 75 Minn. 43; *Shadewald v. White*, 74 Minn. 208; *Ravlin v. Chicago, A. & DeK. R.R. Co.*, 297 Ill. 131; *Thompson v. Halladay*, 15 Or. 34, 55; *Carr v. Houser*, 46 Ga. 477; *Bolles v. Duff*, 54 Barb. (N.Y.) 215; *Nugent v. Nugent*, (1907) 2 Ch. 292, aff'd (1908) 1 Ch. 546; *Alven v. Bond*, Flanagan & Kelly's Rep., 196; *Eyre v. M'Donnell*, 15 Ir. Ch. Rep. 534; *Boddington v. Langford*, 15 Ir. Ch. Rep. 558; *Anderson v. Anderson*, 9 Ir. Eq. Rep. 23; *U. S. F. & G. Co. v. Minnehoma Oil Corp.*, 116 Okla. 10; *Johnson v. Gunter*, 6 Bush (59 Ky.) 534.

Reeves v. Crum, 97 Okla. 293, relied on by the courts below, cited no authority in support of its ruling on the question at issue, and being in conflict with the great weight of authority is not entitled to serve as a precedent govern-

ing the propriety of the conduct of a federal court officer. The issues in that case and the scope of review were limited.

As to the last question, the fee division agreement between Simkins, the receiver, and Ingalls, the court below branded it as reprehensible. In applying *Woods v. City National Bank & Trust Co.*, which it held controlling of the situation, it deprived Ingalls of any additional compensation but permitted Simkins to retain his. It would appear that the illegality of the agreement is not apportionable, and the right to compensation, if denied one, should be denied both. The vice lay particularly with Simkins who initiated it (R. 109) and who was influenced by it in his subsequent conduct as receiver.

CONCLUSION.

The standards required of a trustee are most effectively stated by Mr. Justice Rutledge in *Earll v. Picken*, 113 F. (2) 150:

(p. 155) "The foundation of the rule is the trustee's obligation of undivided loyalty to the trust. He cannot deal with it at arm's length or in the mores of the market place. Acquisition of an adverse interest interjects self-interest into a relation with which it is wholly incompatible and dilutes the allegiance of confidence with self-preservation. That others may purchase the security and take full advantage of their bargain, that the *cestui* has not the means to do so, or that the trustee might do so if he were not trustee, does not destroy the obligation or permit him to subject it to 'the "disintegrating erosion" of particular exceptions.' By accepting the trust he disqualifies himself to accept such a bargain and the disqualification continues while the trust remains. . . .

(p. 156) "The rule may be a vestigial reflection of an ancient morality. But whether so or not, the old law should be held fast which marks off the obligation of confidence and conscience from the temptation induced by self-interest. He who would deal at arm's length must stand at arm's length. And he must do so open as an adversary, not disguised as confident and protector. He cannot commingle his trusteeship with merchandising on his own account. No device of concealment, whether in the use of straw men or otherwise, can legitimate such a miscegenation."

We respectfully submit that the questions presented by this petition are of nation-wide importance and of far-reaching consequences—striking at the very integrity of the federal courts in their resort to the remedy of receiverships frequently employed,—making them worthy of the honorable court's deliberation and determination.

Respectfully submitted,

ISAAC E. FERGUSON,

Counsel for Petitioner

NATHAN HOFFENBERG,

JOSEPH ROSENBAUM,

Of Counsel.

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CHARLES ELMORE CROPLEY
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 317

CRITES, INCORPORATED,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, RICHARD SIMKINS AND
GEORGE FLORENCE,

Respondents:

IN PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Fee-splitting agreement.

The respondents attempt to make it appear that the fee-splitting agreement made between Ingalls, one of the attorneys for the plaintiff (Prudential), and Simkins, one of the receivers of the property under foreclosure, was limited to the original retainer fee of \$1,100 received by Ingalls from Prudential. It is euphemistically stated that Simkins received half of this fee as a "forwarder." But the full scope of the fee-splitting agreement was revealed by Ingalls himself, as follows (R. 113-114):

"Q. Did you (Ingalls) have any understanding with Mr. Simkins as to the participation of fees re-

ceived either by you or him? A. We had an agreement when we entered into the case that we would divide the fees in this case.

Q. What do you mean by that, "divide the fees in this case"? A. I presumed that he expected to be appointed receiver, and he would receive certain fees there, and I would receive a fee as attorney for the receiver, and we would pool those fees.

Q. You mean by that, Mr. Ingalls, that any fees received in or arising out of this case would be pooled or divided between you? A. That is what I assumed."

Simkins' secret dealings with Prudential's prospective purchaser.

The respondents refer to the testimony of Simkins that when the agent of the prospective purchaser came to see him prior to the foreclosure sale and asked him if it was possible to buy the farms as a single unit, Simkins told him that "as receivers we had nothing to do with the sales." Then follows quotation of the testimony of the agent, Jones, to the effect that Simkins told him that he was in no position to offer the land to anybody until after the foreclosure sale.

Simkins' active participation in the negotiations with Jones, prior to the foreclosure sale, is definitely shown by Simkins' letter of June 27, 1933 to Prudential, transmitting the contract of sale (R. 288):

"Please note in particular the manner provided for acceptance of this contract and that it provides that two copies be returned to my office after acceptance. I think everything else has been fully discussed over the telephone. Mr. Simerman and I are fully convinced that Mr. Jones' buyer is as he has stated to us and as we have stated to you over the telephone."

*Conclusions of trial court regarding
Simkins' conduct.*

The district court adopted as its own the conclusions of law reported by the special master. (R. 366, 372.) The master concluded (R. 103):

"That the conduct of Receiver Simkins was objectionable in that it was open to, and did cause criticism which, as an officer of this court, it was his duty to avoid; but that under the circumstances, such conduct constituted no violation of his trust which would justify action by this court in the manner requested in this exception."

The question at issue.

The respondents have undertaken to restate the question at issue, as follows:

"May one of two co-receivers in a foreclosure proceeding, this co-receiver being an attorney, with impunity while acting as such receiver for the collection of rents and profits only, accept legal employment from a real estate agent who is intent upon purchasing the real estate in question from the Prudential Insurance Company of America, the mortgagee, who becomes the purchaser at the marshal's sale; and could said attorney co-receiver accept compensation from this real estate agent without notifying the court, his co-receiver and appellant?" (Respondents' brief, p. 4.)

Passing the fiction of "legal employment from a real estate agent," the question as rephrased by the respondents ignores at least three vital elements: (1) that the dealings of the co-receiver with the agent of the prospective purchaser preceded the foreclosure sale; (2) that the price to be obtained by Prudential from said purchaser was substantially in excess of the mortgage indebtedness;

(3) that the co-receiver failed to make disclosure of the terms of the proposed sale, not only of his commission agreement with Jones, to the court, his co-receiver and the mortgagor.

Cases cited by respondents.

The four cases cited by the respondents are not at all in point. None involved a federal receiver, or custodian of property. In none, finally, was there found any element of fraud, concealment or bad faith. In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, a director who loaned money to his corporation on the security of a mortgage was permitted to become the purchaser at the trustee's foreclosure sale. In *Allen v. Gillette*, 127 U. S. 589, an administrator became the purchaser at a sale of real estate made by a mortgage trustee in the foreclosure of a mortgage made by the decedent's heirs. In *Pewabic Mining Co. v. Mason*, 145 U. S. 349, on dissolution of a corporation stockholders (standing in the relation of tenants in common) were permitted to purchase property of the corporation at a judicial sale held pursuant to a decree of liquidation. And in *Starkweather v. Jenner*, 216 U. S. 524, a purchase by syndicate members of syndicate real estate at a trustee's foreclosure sale made under a first mortgage trust deed, was upheld.

. . .

We again respectfully urge that this case merits further review by this court, in furtherance of a high standard of conduct for receivers appointed by the federal court.

Respectfully submitted,

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Counsel for petitioner

NATHAN HAPFENBERG,

JOSEPH ROSENBAUM,

Of Counsel.



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RICHARD SIMKINS AND GEORGE FLORENCE,**

respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S BRIEF

✓

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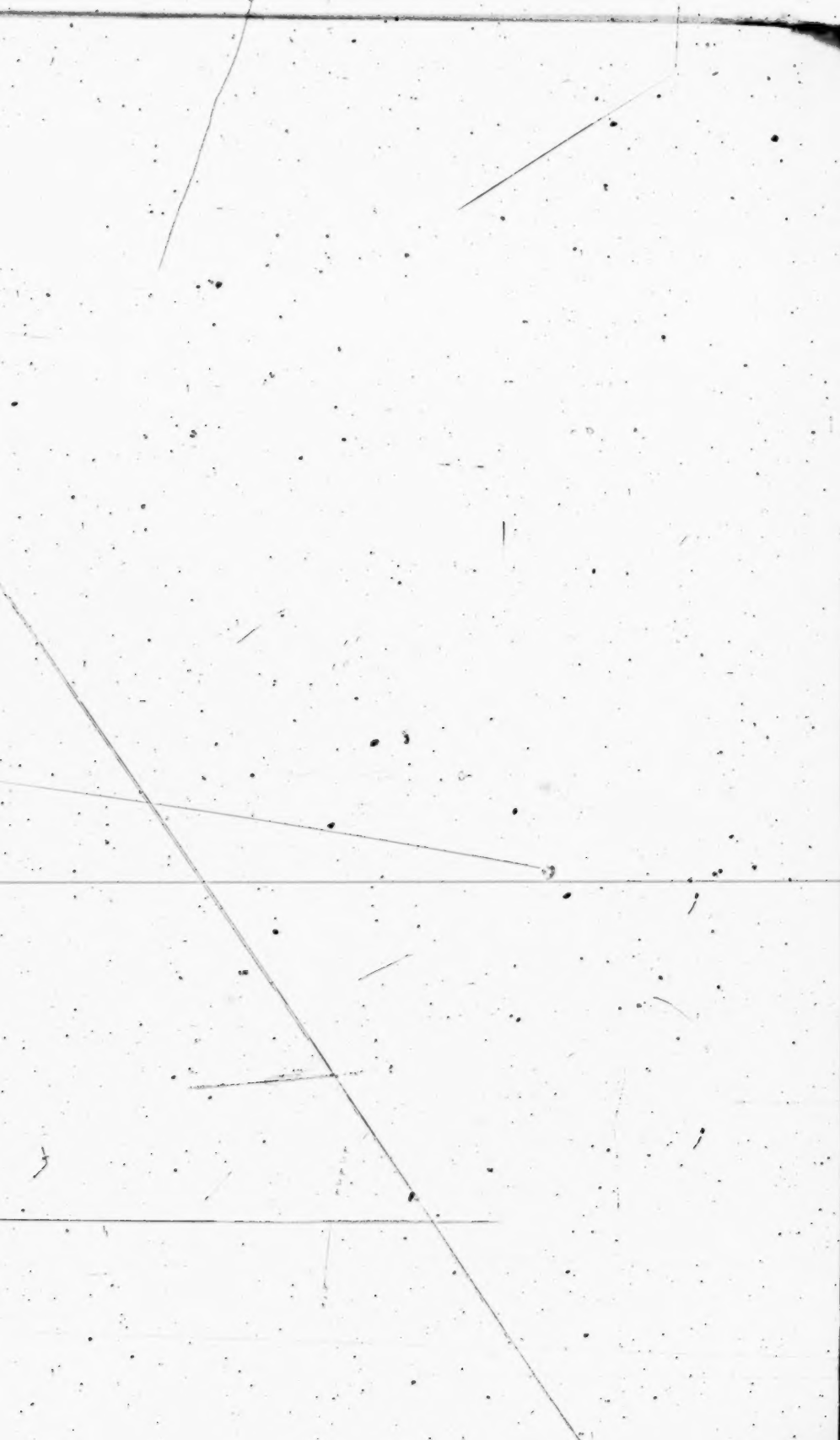
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PETITIONER'S BRIEF

Opinion of the court below.

No written opinion was filed by the district court.* The opinion of the circuit court of appeals appears in the record at pages 387 to 393 and is reported in 134 F. 2d 925.

Jurisdictional statement.

A writ of certiorari was granted by this court November 8, 1943, pursuant to section 240 (a) of the Judicial Code, as amended by act of February 13, 1925 (28 U.S.C., § 347 [a]).

*The exceptions to the receivers' accounts were passed upon by Judge Underwood. In the earlier stages of the litigation, Judge Hough presided (until his death in 1935).

STATEMENT OF THE CASE.

Judgment.

The judgment of the circuit court of appeals affirmed (with one modification) the order of the district court approving the accounts rendered by George Florence and Richard Simkins, as receivers appointed by the court in 22 consolidated foreclosure suits, and overruling all of petitioner's exceptions to the receivers' reports. (Order of district court—R. 371.)

In the circuit court of appeals, petitioner pressed its objections to the following items in the receivers' accounts:

- (1) Failure to surcharge one of the receivers, Richard Simkins, for the compensation received by him from Edwin Jones, in connection with the purchase by Jones (for Col. Proctor) of the 11 mortgaged farms situated in Madison County, Ohio, pursuant to a contract of purchase made with Prudential Insurance Company prior to the sale of these farms under the foreclosure decrees.
- (2) Failure to surcharge said receiver with the commission or profit made by Jones in said transaction.
- (3) Failure to surcharge said receiver with the profit made by the Prudential Insurance Company in said transaction (i.e., the excess over the mortgage decree indebtedness received by Prudential in the resale of these 11 farms).
- (4) Failure to surcharge said receiver with the amounts received by him from O. C. Ingalls, one of the attorneys for the plaintiff (Prudential), pursuant to a fee-splitting agreement between said receiver and said attorney.
- (5) Failure to surcharge said receiver for \$250 previously allowed to him by the court on account of his fees, also the additional sum of \$1800 taken by him on account of fees without formal court order.
- (6) Allowance of credits taken by said receiver for expenses in a lump sum per month, without proof of his actual expenses.

- (7) Allowance of credits for sums paid to the law firm of Abernathy & Simkins for stenographic expenses.

The foreclosure suits were filed February 17, 1932 by Remy, Harrison & Remy, of Indianapolis, and Ingalls & Selby, of Columbus, as attorneys for Prudential Insurance Company. (R. 8.) On the same day the receivers were appointed. (R. 10.) March 3, 1932 an order was entered, on *ex parte* application by the receivers, appointing the attorneys for the plaintiff as attorneys for the receiver. (R. 11-13, last paragraph.)

By orders entered January 17, 1933 a partial allowance of \$250 on account of services was made to each of the receivers and each of the attorneys. (R. 20.) February 19, 1937 one of said attorneys, O. C. Ingalls, filed an application for allowance of \$1200 additional compensation for services claimed to have been rendered as attorney for the receivers. (R. 33.) Objection to this application was made by the plaintiff (Prudential), whom Ingalls was still representing as attorney in these foreclosure suits. (R. 47.) Objection to any fee allowances to the receivers or their attorneys was made by the defendant Crites, Inc., as part of its exceptions to the receivers' accounts. (R. 52, ¶ 12.) The Ingalls fee application was referred to the special master, together with the receivers' accounts, and the master found that many of the items included in Ingalls' statement of services consisted of services for Prudential and not for the receivers, therefore were not chargeable to the receivership estate. (R. 105.) Before the court acted on the master's report, Ingalls withdrew his pending application for fees and substituted a new application (May 25, 1939) for compensation in the sum of \$2500. (R. 356.) To this substituted application, Prudential filed no objection, but objections were filed by the defendant Crites, Inc. (R. 364.) A memorandum was filed by the district judge on March 12, 1940 finding that Ingalls, since

the date of the \$250 fee allowance of January 17, 1933, had rendered additional services as counsel for the receivers of the reasonable value of \$275. (R. 366.) On April 8, 1941, notwithstanding the memorandum filed March 12, 1940, the court entered an order making an additional fee allowance of compensation to Ingalls, as one of the counsel for the receivers, in the sum of \$2200. (R. 368.) Because the funds otherwise available were insufficient to pay the fees allowed to Ingalls, the special master and the court reporter, the Prudential Insurance Company was ordered to pay the deficiency. Thereupon Prudential filed a motion to retax the costs taxed against it by the order dated April 8, 1941. (R. 370.) No order has as yet been entered by the district court on plaintiff's motion to retax costs.

The circuit court of appeals affirmed the order of the district court overruling all of petitioner's exceptions to the receivers' accounts. However, because of the fee-splitting arrangement between Ingalls and Simkins, also because of the impropriety of accepting appointment as attorney for the receivers while serving as attorney for the plaintiff, the circuit court of appeals declared that no additional attorney fees should be allowed to Ingalls (or Harrison, who was not asking for any additional fees as one of the attorneys for the receivers). (R. 392-393.)

Facts.

The plaintiff filed simultaneously 22 foreclosure suits, but only 11 of these suits are involved in this appeal, these 11 suits covering contiguous farms in Madison County, Ohio. The mortgages on these 11 farms, aggregating \$192,000 (R. 2, 9), were made to Prudential Insurance Company on October 17, 1929 and were matured by acceleration on December 30, 1931. (R. 3.)

The opinion of the circuit court of appeals fails to show that, while these 11 farms were mortgaged to Prudential for \$192,000, an offer to purchase these farms for \$500,000 was made to Henry M. Crites by Edwin Jones, representing J. C. Penny of New York. (R. 201.)

No answers to the foreclosure complaints were filed by any of the defendants and an order defaulting the defendants for want of answer and decrees *pro confesso* could have been entered at any time after April 20, 1932. (R. 24.) However, as testified by George Florence, one of the receivers, the district judge was then of the opinion that the farms should continue to be operated by the receivers for another year, that he thought times would be better and the farms would sell better. (R. 128.) Accordingly, the decrees *pro confesso* were not entered until May 2, 1933 and by these decrees it was ordered that in default of payment by any of the defendants of the decree indebtedness the farms should be sold by the United States marshal on July 1, 1933, at public sale, for cash at not less than two-thirds of the appraised value. (R. 24-25.) The decree indebtedness in the 11 cases here involved (afterwards consolidated for hearing on the receivers' accounts) was \$223,742.32. (R. 24-26.)

The appraisers appointed by the marshal filed their appraisal on May 17, 1933, at aggregate valuation of \$244,080 for the 11 farms. (R. 26.) Thus, the minimum bids at which the 11 farms could be sold by the marshal aggregated \$162,720. On June 27, 1933, unknown to the defendant Crites, Inc., or to the district court, a contract for the purchase of the 11 farms from Prudential was signed by Edwin Jones. This contract called for a deed of general warranty conveying the farms free and clear of all encumbrances, except certain taxes, said conveyance to carry "the company's" undivided one-half interest in the growing crops thereon in accordance with the existing lease

thereon," Jones to pay the sum of \$249,106 net to Prudential. (R. 61.) The signature of Jones was witnessed by Richard Simkins, also by Simkins' secretary, Marion R. Lutz. (R. 63, 193.)

The contract was made in contemplation of the acquisition of title to the farms by Prudential as purchaser at the foreclosure sales to be held July 1, 1933. Earnest money of \$3,000 was deposited by Jones with Prudential. (R. 212, 213.) When the contract was signed by Jones he handed it to Simkins and Simkins transmitted it to Prudential. (R. 288.) From this letter it appears that Jones was not buying the farms for himself, but for a principal whose identity had been disclosed to the representatives of Prudential.

There is some uncertainty in the testimony about the time of the negotiations between Jones and Prudential. Jones testified that he first talked with Vance Simerman, of Prudential Insurance Company, about a purchase of the Madison County farms and that Simerman told him he was in no position to talk about it now, that they did not have the farms and were not in any position to sell. (R. 202, 204, 205.) Then, about four or five weeks before the foreclosure sales, Jones called on Simkins, whom he had known for fifteen or twenty years, and had a conversation with Simkins regarding purchase of the Madison County farms.

"I went to see him and told him that he was one of the attorneys in the matter, and I was interested in trying to buy it, he told me 'we are in no position to offer it right now, not in position until after the foreclosure proceedings and the Prudential Insurance Company acquires title for it, then they would be in position to offer it to anybody else trying to buy it.' I told him that I would like to have him intercede for me if he would, and it was at my suggestion that I told him that, and he said he would do what he could for me, so that was about the end of that." (R. 206.)

Some kind of a written contract was made to evidence the arrangement between Jones and Simkins, but a copy of this contract was never produced. (R. 207.) Jones said that he did not know how much he was to pay Simkins; but that he was to pay Simkins "for his services in helping me in getting this farm, acquiring the farm, and any other services in the way of legal work" (R. 207); that his arrangement with Simkins was conditional and he was not to pay anything to Simkins unless he secured these Madison County farms. (R. 208.)

The principal whom Jones represented was Col. Cooper Proctor. The record does not show directly the amount agreed to be paid and ultimately paid by Proctor for the 11 farms, but the documentary tax stamps on the deed from Prudential to Proctor's nominee, Mary E. Johnston, indicated payment by Proctor of approximately \$281,000 (R. 346); presumably, \$249,106 net to Prudential, in accordance with the Jones-Prudential contract of June 27, 1933; and the difference of \$31,894 to Jones. (See testimony of Jones about payments received by him from Proctor—R. 219.)

At the foreclosure sales held July 1, 1933, the only bidder for the Madison County farms was the mortgagee, Prudential Insurance Company. (R. 267.) The bids of Prudential on the 11 farms aggregated \$163,900 (R. 32), or slightly more than the upset price of \$162,720 (representing two-thirds of appraised value). In the opinion of the circuit court of appeals it is stated as an absolute matter of fact that Proctor was not a prospective bidder at the marshal's sale (R. 389); and that although Jones was present at the marshal's sale, he did not bid because he lacked authority to do so. (R. 390). All that appears in the record in support of these assertions is the testimony of Jones himself that he was not authorized by his prospective purchaser to buy the 11 Madison County farms aggregating 4,844 acres, except as a whole. (R. 220.) However, Jones further

testified that he never told Simkins and the Prudential Insurance Company he was only interested in buying the 4,844 acres as a unit. (R. 221.)

By force of the contract made with Prudential on June 27, 1933, under which he was bound to take the 11 farms from Prudential at net price of \$249,106, Jones had cut himself off as a possible bidder at the foreclosure sales. What Jones or Proctor might otherwise have done, if this contract had not been made, seems to rest entirely in argument and speculation.

In contrast with the dealings between Simkins, Jones and Prudential, the evidence shows that prior to the foreclosure sales another prospective purchaser wrote a letter to Prudential inquiring whether the Madison County farms could be purchased at private sale, but at a price unattractive to Prudential. In this instance, the answer was that Prudential did not own the property and was in no position to make any sale, that any sale would have to be worked out with the owner of the equity, Crites, Inc. (R. 271.)

It is stated in the opinion of the circuit court of appeals: "Jones paid Simkins a total of \$2,797, although part of it was not on account of the Proctor transaction but for other legal services Simkins had performed for Jones." (R. 390.) Simkins testified that on July 3, 1933 Jones paid him \$500; on July 8, \$1,000; on August 18, when the deal with Proctor was closed, \$1,297; that there was a small debt due to him from Jones for services separate from the farms, but not to exceed a maximum of \$200, and that the balance represented fees paid to him in connection with the Madison County farms. (R. 273-274.)

Further, the circuit court of appeals states: "Jones and Simkins entered into an agreement by which Jones engaged Simkins to represent him as his attorney in consummating the purchase, his compensation, however, to

depend on whether or not the deal would be completed." (R. 390.) Reference has already been made to the testimony of Jones regarding the nature of Simkins' employment (*supra*, p. 6). Simkins himself testified that he did not examine the title; that Proctor was represented in the transaction by the law firm of Dinsmore, Shohl & Sawyer of Cincinnati. (R. 149.) On cross-examination Simkins was asked: "How do you justify a fee of \$2,000 or \$3,000 paid to you by Mr. Jones?" He answered: "That is none of your business. I negotiate the fees with my clients and fix the fees in my office to suit myself." (R. 159.)

The fee-splitting agreement.

The foreclosure suits were filed at Columbus, Ohio. O. C. Ingalls, of Columbus, testified that he was retained as attorney for the plaintiff originally by Richard Simkins, of Circleville, Ohio, and later by Davis Harrison, of Indianapolis, Indiana. (R. 109.) Simkins had over a period of years represented the Prudential Insurance Company as attorney in various foreclosure matters (R. 137-138); likewise Davis Harrison (R. 221-222). Ingalls said that Simkins told him that there was to be an application for the appointment of a receiver for the Crites farms; that he (Simkins) was to be appointed the receiver, and that Ingalls was to be appointed one of counsel for the receiver. (R. 109.) On the subject of fees, we quote the following from Ingalls' testimony:

"Q. Did you have any understanding with Mr. Simkins as to the participation of fees received either by you or him?

"A. We had an agreement when we entered into the case that we would divide the fees in this case.

"Q. What do you mean by that, 'divide the fees in this case'?

"A I presume that he expected to be appointed receiver, and he would receive certain fees direct, and I would receive a fee as attorney for the receiver, and we would pool those fees.

"Q You mean by that, Mr. Ingalls, that any fees received in or arising out of this case would be pooled or divided between you?

"A That is what I assumed." (R. 113-114.)

Soon after the institution of the foreclosure suits, Ingalls received from Prudential "an advancement" of \$50 per case for each of the 22 cases, or \$1100. (R. 113.) Of this retainer of \$1100, one-half was turned over by Ingalls to Simkins. (R. 113, 279.) The only further fee received by Ingalls in these foreclosure cases was the \$250 allowed by the court in partial compensation for his services as counsel for the receivers, at which time Simkins was also allowed \$250. (R. 20.)

It does not appear that Simkins reciprocated by dividing with Ingalls the additional fees of \$1800 which he paid to himself on account of his services as receiver, or any part of the \$2,797 that he received from Jones. However, in response to a request from Harrison for a share of his fees, Simkins made payments to Harrison of \$200, \$300 and \$500, the latter payment on August 18, 1933, the day when Simkins received his final payment from Jones. (R. 222, 234-235, 274, 311-312.)

Specification of errors to be urged.

(1) The circuit court of appeals erred in affirming the order of the district court overruling all of petitioner's exceptions to the receivers' accounts (except, in part, the exceptions to any allowance of compensation to the receivers' attorneys).

(2) The circuit court of appeals erred in not directing the district court to surcharge the receiver Simkins with

(a) the money received by Simkins from Jones, (b) the commission or profit received by Jones, (c) the amount received by Prudential in excess of the decree indebtedness, or at least the amount by which the appraised value of the Madison County farms exceeded the decree indebtedness.

(3) The circuit court of appeals, although it held that Ingalls should be punished by denial of further compensation, erred in failing to direct the district court to require Simkins to refund all fees allowed or taken by him out of the receivership estate.

SUMMARY OF THE ARGUMENT.

I.

Simkins breached his duty as receiver by accepting employment from Jones (Proctor's agent), in advance of the foreclosure sales, to help bring about a sale of the Madison County farms by Prudential Insurance Company to Proctor.

Jackson v. Smith, 254 U.S. 586, 41 S. Ct. 200, 65 L. ed. 418.

Nugent v. Nugent (1907) 2 Ch. 292, 76 L. J. Ch. 614, *affd.* (1908) 1 Ch. 546, 77 L. J. Ch. 271.

In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809, 812.

Shadewald v. White, 74 Minn. 208, 77 N. W. 42.

Donahue v. Quackenbush, 62 Minn. 132, 64 N. W. 141; 75 Minn. 43, 77 N. W. 430.

Cook v. Martin, 75 Ark. 40, 45; 87 S.W. 625, 627.

Baker v. Schofield, 243 U.S. 114, 118, 61 L. ed. 626, 631.

A. The district court and the circuit court of appeals erroneously concluded that, because the foreclosure sales were conducted by the marshal and not by the receivers, there was no conflict between the personal interest of Simkins as associate broker and his fiduciary obligations as receiver.

B. By accepting employment as associate broker, it became a matter of personal advantage to Simkins to see that Prudential was the successful bidder at the foreclosure sales, at whatever price Prudential might choose to bid; whereas, in his official capacity as receiver, it was the duty of Simkins to bring to the attention of the court and all the parties information that might affect their

interests and not to make himself the secret ally of the mortgagee as against the owner of the equity.

C. It was obviously of vital importance to the owner of the equity—and to the court which had the sales in charge—to be informed prior to the foreclosure sales of the identity of a prospective buyer willing to pay approximately \$281,000 for the 11 farms (\$249,106 to Prudential and the balance to Jones).

D. To argue, after the event, that such disclosure would have served no practical purpose and that even with such disclosure Prudential would nevertheless have bid in the farms for \$163,900, or \$60,842.32 less than the decree indebtedness, is to indulge in unwarranted surmise and speculation in ~~the~~ ~~favor~~ of the receiver.

American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 146, 85 L. ed. 91, 96.
Woods v. City National Bank & Trust Co., 312 U.S. 262, 268, 85 L. Ed. 820, 825, 826.

E. The foreclosure sales, as a result of the pre-arrangement to which Simkins was an accessory, became a medium by which Prudential made a profit of \$25,363.78 above the aggregate decree indebtedness and Jones a profit of approximately \$31,000 (in which Simkins admittedly participated to the extent of \$2,797).

F. Simkins is severally liable to petitioner for the profit in excess of the decree indebtedness realized by Prudential Insurance Company and by Jones and by himself.

Jackson v. Smith, 254 U.S. 586, 589.

II.

Prudential contracted with Jones to sell its interest (meaning the receivers' interest) in the growing crops, as well as the land, and as to the growing crops Simkins was in the position of a fiduciary-owner.

A. By virtue of the employment which Simkins accepted from Jones, it became a matter of personal interest to Simkins to help Prudential acquire the title to the receivers' interest in the growing crops, as well as the title to the land, otherwise he would not have received any compensation for his services as associate broker.

B. The transaction with respect to the growing crops further illustrates the position of partiality assumed by Simkins in favor of Prudential and against the petitioner.

C. The law will not permit a fiduciary to occupy such a position of conflicting interest, regardless of the alleged merits or demerits of the particular transaction.

See cases cited under point I.

Earll v. Picken (Ct. App., D.C.), 113 F. 2d 150, 155-158.

Woods v. City National Bank & Trust Co., 312 U.S. 262, 268-269, 85 L. ed. 820, 825-826.

In re Marquette Manor Bldg. Corp. (C.C.A. 7), 97 F. 2d 733, 735 (cert. den. 305 U.S. 648).

III.

The fee-splitting agreement between Ingalls, attorney for the plaintiff and for the receivers, and Simkins, one of the receivers, called for disallowance of compensation to Simkins out of the receivership estate.

Weil v. Neary, 278 U.S. 160, 172, 73 L. ed. 243, 250.

Woods v. City National Bank & Trust Co., 312

U.S., 262, 269, 85 L. ed. 820, 826.

A. The circuit court of appeals incongruously held that Ingalls should be denied the additional compensation of \$2200 awarded to him by the district court, yet at the same time permitted Simkins to retain the \$250 fee originally allowed to him by the court and the additional \$1800 subsequently taken by him on account of fees without formal court order.

ARGUMENT.

I.

The Simkins-Jones deal.

When Simkins, erstwhile lawyer for Prudential Insurance Company, was appointed by the district court as one of the two receivers in the foreclosure suits, he became charged with 'fiduciary obligations' to the mortgagors and their assignee, Crites, Inc., as well as to the mortgagee, Prudential Insurance Company. But the circuit court of appeals, we respectfully urge, pays only lip homage to this proposition and emasculates it by too narrow delimitation of the receivers' obligations. It is argued that the receivership was confined to the operation and management of the mortgaged farms and that the receivers had no duties or obligations with respect to the sale. We find no such exact divisibility of purpose in the orders of the district court, but rather a single purpose to administer and liquidate the trust property in the manner most beneficial to all parties concerned.

A controlling fact of the case, ignored by the circuit court of appeals, is that the district court purposely delayed entry of the decrees of foreclosure and permitted the receivership to continue for another year in the hope that times would be better and the farms would sell better (*supra*, p. 5). Obviously, the benefit of better times and a better sale would inure to the owner of the equity rather than the mortgagee, since the mortgagee could always protect itself by bidding in the properties at the foreclosure sales if satisfactory bids were not made by outsiders. Apparently the decision of the court to defer entry of decrees of sale was made upon consultation with at least one

of the receivers, George Florence (*supra*, p. 5), but the evidence fails to show upon what representations the court finally decided to permit the mortgaged farms to go to sale on July 1, 1933. It is to be noted, however, that the co-receiver (George Florence) then was uninformed of the transaction between Proctor, Jones and Prudential Insurance Company, or of the interest of Simkins in this transaction. (R. 133, 134.)

The circuit court of appeals says that one occupying a fiduciary relation may not purchase or be interested in the purchase of the trust property for his own benefit; but that, "where the sale of trust property is made pursuant to a decree of the court, by a special commissioner or other agent appointed by the court, the fiduciary has the right and privilege of purchasing." (R. 391.) The argument is that, in the present case, Simkins was not a liquidating receiver and "had nothing to do with bringing about the sale and no control over the manner in which it was carried on." (R. 391.) Further, that he did nothing to stifle the bidding, and that "the knowledge of Proctor's interest in the property withheld from Crites could have been of no value to it if disclosed." (R. 391.)

One difficulty with this argument is that it evades the true nature and effect of the agreement between Jones and Simkins. Second, the circuit court of appeals postulates as an absolute certainty a proposition inherently conjectural, namely, that disclosure to petitioner of Proctor's willingness to pay approximately \$281,000 for the 11 farms would have been of no benefit to petitioner.

Prior to the foreclosure sales, Prudential Insurance Company could not enter into an agreement to sell the 11 Madison County farms to a prospective buyer except upon the assumption that Prudential would obtain title to all of these farms through the foreclosure sales. For this rea-

son, when the representatives of Prudential were first approached by Jones (on behalf of his principal, Col. Proctor), they told him that they would not be in a position to make a bargain for a sale of the farms until after the foreclosure sales. Jones then approached Simkins, whom he had known for many years, and asked him to "intercede" for him with Prudential Insurance Company, in order to induce the company to agree in advance of the foreclosure sales to sell him the 11 farms for \$249,106 net to Prudential. Simkins was able to accomplish what Jones had not been able to accomplish for himself, but Prudential's agreement to sell the farms to Jones was expressly conditioned upon acquisition of title to the 11 farms through the foreclosure sales. At the same time, the agreement of Jones to pay Simkins part of his commission or profit was conditioned upon consummation of the agreed sale by Prudential to Jones. Thus, it became a matter of personal interest to Simkins to make sure that Prudential should become the successful bidder at the foreclosure sales for all of the Madison County farms; and further, that there should be no competitive bidding on any one or more of the farms, or redemption by the equity owner on one or more of the farms, that would prevent consummation of the sale by Prudential to Jones.

Significantly, although Simkins was entitled to no recompense from Jones until the resale by Prudential to Proctor (through Jones) was consummated, which did not occur until August 18, 1933, Jones paid Simkins \$500 on July 3, 1933 and \$1,000 on July 8, 1933, after the marshal's sale on July 1, 1933, *but before confirmation of the marshal's sale by the court on July 18, 1933*. Not only did Jones want the aid of Simkins to obtain a definite commitment from Prudential prior to the foreclosure sales, so that Jones could stand aside and let Prudential, in effect, bid for him, but he also wanted to make sure that Simkins would make no disclosure prior to confirmation of the marshal's sale

that might put the defendants in position to challenge Prudential's purchase, or to upset Jones' deal. And further, these payments made by Jones to Simkins prior to the confirmation of the marshal's sale indicate the degree of reassurance given by Simkins to Jones that the marshal's sale would be confirmed and Prudential thereby enabled to carry out its deal with Jones.

The circuit court of appeals, it seems to us, deals with Simkins' non-disclosure of his secret alliance with Jones and Prudential as a mere matter of inadvertence; or, at any rate, as a matter of no consequence. It is clear that Prudential was informed not only of the offer made by Jones, but also that Jones was acting as broker or intermediary for a principal whose identity was disclosed to Prudential and of whose financial responsibility Prudential was satisfied; but the petitioner and the district judge were informed, at the most, only that an unrevealed prospective purchaser wanted to buy (at undisclosed price) the 11 farms as a unit, which it was assumed the court could not accomplish.

We contend that this case does not turn on the question whether Simkins was a liquidating receiver or a managing receiver. He and his co-receiver were in charge of the trust property, as the representatives of the court, for the purpose of getting enough money out of the trust property to pay in full the mortgage indebtedness and if possible an overplus to the owner of the equity. All information to this end that came to him while he held office as the court's representative belonged to the court and all parties to the foreclosure proceedings. He could not properly, in relation to the trust estate, split himself into two separate and independent personalities. He could not properly determine for himself that part of the information relating to the trust estate which came to him as associate broker with Jones did not belong to him as receiver, therefore need not

be divulged to the court and all beneficiaries of the receivership.

Is it self-evident, to the point of absolute certainty, as assumed by the circuit court of appeals, that the petitioner as owner of the 11 farms could not have profited by knowledge in advance of the foreclosure sales that a financially responsible buyer was willing to pay approximately \$281,000 for the 11 farms as a unit? When it is said that the district court could not order a sale of the 11 farms as a unit, because there were 11 separate decrees of foreclosure, it seems to us that the statement calls for obvious qualifications. It is true, of course, that the district court could not order a sale of the 11 farms as a unit over the objections of the defendants, since this would preclude redemption of one or more of the farms, or perhaps bids on the separate farms more advantageous to the defendants than the bid on the 11 farms as a unit. However, the parties and the interests in all the foreclosure suits were exactly the same; therefore, *if it had been known to the defendants as well as the plaintiff that the 11 farms could be sold together at a price in excess of the mortgage indebtedness*, the court could have postponed the sales in order to give petitioner an opportunity to bargain with the prospective purchaser.

The petitioner, as owner of the 11 farms, was the only party that could have made an unconditional agreement to convey the 11 farms as a unit. At the price of approximately \$281,000 paid by Proctor, or even at the net price of \$249,106 received by Prudential, a sale of the 11 farms by petitioner would have yielded more than enough to pay the entire mortgage indebtedness and Prudential as mortgagee should have been content with such a result. At the price paid by Proctor, there was generous margin for a normal commission to a broker and all expenses of sale.

It is said in the opinion of the circuit court of appeals that Proctor desired, in addition to a conveyance of the 11 farms as a unit, a warranty deed from Prudential Insurance Company. Manifestly, the reference to a warranty deed could have meant only that Proctor wanted an assured title to the farms and there is nothing in the evidence to indicate that petitioner could not have furnished muniments of title satisfactory to Proctor and his lawyers. As a matter of fact, the sale by Prudential to Proctor was closed on title policies furnished by a title guarantee company and not merely on the deed from Prudential to Proctor's nominee. (R. 249, 250.)

But even if it could be said that the opportunity to bargain with Proctor or his representatives would have been of no avail to the petitioner, the knowledge that at least one buyer was willing to take the 11 farms at a cash price substantially in excess of the appraisals (aggregating \$244,080) might well have resulted in further deferment of the sales. The court had already waited a year for better times and a better sale, therefore it is reasonable to assume that the court would have granted further delay if requested by the petitioner. Indeed, there is nothing in the record proceedings to show why the decrees *pro confesso* were entered on May 2, 1933 and the date of sale fixed at July 1, 1933. Not only was the time of sale out of season for farm property, but the time was the darkest hour in the economic history of our nation. It is a matter of judicial notice that in the spring of 1933 the operations of thousands of our banks and other lending institutions came to a complete standstill. If reason existed in 1932 to await a better time of sale, such reason existed in far greater measure in the year 1933, when the legislatures of various states (by the enactment of moratorium laws) and courts of equity (by granting extraordinary remedies, such as limitation of deficiency judgments) were proceeding upon the assumption that the

deflation of real estate values had overshot the mark and that salvage could be saved to the equity owners by a reasonable period of delay.

There is also to be considered the possibility that the petitioner, if fully informed of the dealings between Prudential and Jones, could have demanded from Prudential more equitable treatment. The petitioner would not have been a helpless suppliant, since it was within the power of the petitioner to pay the decree indebtedness on any one of the farms and thus defeat the deal between Prudential and Jones. The opinion of the circuit court of appeals may leave the impression that the petitioner had no assets other than its equity interest in the mortgaged farms (R. 388), but the conveyances made by Henry Crites to petitioner covered all of his assets. (R. 110, 134.)

The assertion by the circuit court of appeals that Proctor's representative would not have been a bidder at the foreclosure sales, if no definite agreement had been reached with Prudential prior thereto, is based solely on the statement by Jones (as a witness in 1937) that he was not authorized to buy the Madison County farms except as an entirety of 4,844 acres. (R. 220.) Davis Harrison testified that Jones was present at the marshal's sale and then stated that his buyer was not a bidder at the sale (R. 269), but at the time of the marshal's sale Jones had already deposited \$3,000 earnest money on his agreement to buy the 11 farms from Prudential at net price of \$249,106. Since Prudential was the only bidder at the sale, there obviously was no occasion for Jones to enter into the bidding.

Without pursuing further the possible effects of Simkins' non-disclosure, the final answer is that "the incidence of a particular conflict of interest can seldom be measured with any degree of certainty." (*Woods v. City National Bank & Trust Co.*, 312 U. S. 262, 268.) Once a fiduciary

places himself in a position where his personal interest conflicts with his fiduciary obligations, speculation should not be indulged to absolve him from blame, nor to find in his disloyalty no injury to the complaining beneficiary.

Jackson v. Smith, 254 U. S. 586.

The circuit court of appeals concluded that the principles declared by this court in *Jackson v. Smith* are not applicable to the present case because Ambrose was a managing receiver and not a liquidating receiver. In *Jackson v. Smith* the receiver of a building association had in his charge, among other assets, a defaulted note for \$2700 secured by a mortgage trust deed. The receiver requested the mortgage trustee to advertise the mortgaged land for sale at public auction. At the first sale, the trustee withdrew the property from sale because no adequate bid was made. Prior to the second sale, Smith, Wilson and the receiver (Ambrose) entered into an agreement to purchase the property jointly. Wilson attended the sale and became the purchaser of the property at a bid of \$491. In the opinion of this court, by Mr. Justice Brandeis, it is stated:

"There was no evidence of any improper influence at the sale, to prevent competition, or to close competitive bidding, or to bring about the sale to Wilson in preference to anyone else. On the contrary it affirmatively appears that the sale was fairly conducted; that there was competitive bidding; and that the property was finally knocked down to the highest bidder."

Subsequently the land was resold for \$1400. After payment of taxes and expenses, a net profit of \$743.68 was divided equally between Wilson, Smith and Ambrose. The amount paid to the mortgage trustee was the amount needed to clear the land of tax encumbrances, therefore Ambrose as receiver got nothing on the note.

The suit that came to this court on appeal was a suit by Jackson, as successor receiver, against Smith and Wilson to recover the profits which had been made by them and Ambrose. The trial court held the defendants liable for the full amount of the profit, \$743.68, with interest and costs.* The court of appeals of the District of Columbia reversed the decree of the trial court, but on writ of certiorari this court reversed the judgment of the court of appeals.

Ambrose, be it noted, as receiver of the building association, was not the officer who conducted the sale of the mortgaged land. The sale was conducted by the mortgage trustee under power of sale, free from interference by Ambrose. Furthermore, in contrast with the case at bar, there was competitive bidding at the sale and the receiver had no information about the mortgaged land which gave him or his associates any advantage in the bidding. Nevertheless, this court said as follows:

"Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker v. Schofield*, 243 U. S. 114, 61 L. ed. 626, 37 Sup. Ct. Rep. 333; *Robertson v. Chapman*, 152 U. S. 673, 681, 38 L. ed. 592, 595, 14 Sup. Ct. Rep. 741. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. *J. H. Lane & Co. v. Maple Cotton Mill*, 146 C.C.A. 415, 232 Fed. 421. When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were, or might be, antagonistic to those of his trust. *Michoud v. Girod*, 4 How. 503, 552, 11 L. ed. 1076, 1098. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which

* Ambrose, as receiver, was surcharged in his accounts with the amount of the profits, but did not appeal. 48 App. D. C. 565.

a fiduciary could not legally pursue. *Magruder v. Drury*, 235 U. S. 106, 119, 120, 59 L. ed. 151, 156, 35 Sup. Ct. Rep. 77. Since he did pursue it and profits resulted, the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby. *Magruder v. Drury*, 235 U.S. 106, 59 L. ed. 151, 35 Sup. Ct. Rep. 77. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. *Emery v. Parrott*, 107 Mass. 95, 103; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 134, 74 Am. St. Rep. 845, 79 N.W. 229; *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 18 L.R.A. (N.S.) 1106, 97 Pac. 10. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former, although he had no other relation to the estate; the latter, without regard to the fact that he was also counsel for the receiver."

Cases cited by circuit court of appeals:

The opinion of the circuit court of appeals refers to *Starkweather v. Jenner*, 116 U.S. 524, 54 L. ed. 602, *Turner v. Kirkwood* (C.C.A. 10) 49 F. 2d 590, *Reeves v. Crum*, 97 Okla. 293, *Anderson v. Messinger* (C.C.A. 6), 146 Fed. 929, and *Beckman v. Machinery & Supply Co.*, 9 Oh. App. 275. These cases, we submit, do not support the conclusion reached by the circuit court of appeals in this case. In *Starkweather v. Jenner* the question was whether individual owners of fractional beneficial interests in syndicate property could purchase the syndicate property at a public foreclosure sale ordered by the mortgagee and conducted by the mortgage trustees, and the answer was that such purchase could be made without violation of the fiduciary relationship between tenants in common, "all deceit and fraud out of the way." There was no element in the case of collusion between the mortgagee and the purchaser; no withholding of material information

by one tenant in common from his co-tenants. The complaining co-tenant had himself been the high bidder at the prior sale, but found himself unable to comply with the terms of the sale. At the sale of which the appellant complained, he and others made competitive bids and "although he says he intended to give the syndicate the benefit of his purchase, he said nothing of it, and seemingly sought to secure himself as best he could in the apparent wreck of the joint enterprise." The appellant did not file his bill of complaint until more than four years after he learned that Jenner had made his bid for the benefit of himself and certain other members of the syndicate, during which time there was a large appreciation in the value of the property, therefore *laches* was invoked as another ground for refusing to disturb the sale.

Turner v. Kirkwood (C.C.A. 10), 49 F. 2d 590 was an action brought by Effie T. Kirkwood against her brother Fred E. Turner, individually and as administrator of the estate of Julia A. Turner, their deceased mother. The mother was the owner of certain real estate, of which she deeded an undivided one-half interest to her son Fred. The real estate was then conveyed to a corporation, Old Homestead Company, and the 2,000 shares of capital stock were divided equally between mother and son (except two shares issued to others). In 1909 Julia A. Turner mortgaged certain real estate and pledged her shares of Homestead Company stock to the National Bank of Commerce in St. Louis to secure an indebtedness of approximately \$450,000 owed to the bank by her son Clarence W. Turner. The contract of pledge provided that the pledgor should be entitled to all dividends on the stock during her lifetime and that the pledge should not be foreclosed until 60 days after her death. In 1914 Julia A. Turner and her son Fred incorporated the Eureka Realty Company with a capital stock of 8,000 shares, substantially all of which were issued in exchange for property of the Homestead

Company valued at \$200,000. The directors of Homestead Company then declared a dividend of the Eureka Company stock: to Julia A. Turner and Fred E. Turner, each 3,996 shares. Julia A. Turner transferred her 3,996 shares to her son Fred, one-half to him individually and the other half in trust for his sister, Mrs. Kirkwood. The mother died April 9, 1915 and her son Fred was appointed administrator of her estate.

The bank commenced a suit against the two corporations and various individual defendants to foreclose the mortgage of real estate and the pledge of Mrs. Turner's 999 shares of Homestead Company stock, also to obtain a judgment against Fred E. Turner, individually and as administrator, for the conversion of the 3,996 shares of Eureka Company stock paid to Mrs. Turner as a dividend. The bank obtained a decree of foreclosure, also a money judgment against Fred E. Turner, individually and as administrator, for \$157,982.89 on account of the conversion of the Eureka Company stock paid to the decedent as a dividend.

The indebtedness of Clarence W. Turner to the bank, at the time of said decree, amounted to \$298,596.58. Fred E. Turner and the bank then entered into a compromise agreement which provided for ultimate payment to the bank of \$220,000. In part this agreement provided that the bank should cause the decree in the foreclosure suit to be modified by eliminating the personal judgment against Fred E. Turner, in lieu thereof Turner to deliver to the bank the 3,996 shares of Eureka Company stock paid to the decedent as a dividend by the Homestead Company; and further, that the bank should cause the stock and real estate to be sold pursuant to the modified decree, the bank to buy in the stock and real estate at the foreclosure sale and transfer the same to Turner (unless someone else should carry the bidding beyond certain stipulated sums).

This program was carried out. The foreclosure sale was made by a commissioner appointed by the court, the bank purchased the stock and real estate, then transferred the same to Turner.

Since the indebtedness of Clarence W. Turner to the bank exceeded the value of the pledged stock and mortgaged real estate, there remained no surplus for the decedent's estate. Fred E. Turner, both individually and as administrator, was absolved from liability on account of the conversion of the decedent's 3,996 shares of Eureka Company stock, which went back to the Homestead Company. The litigation left undisturbed the 3,996 shares of Eureka Company stock which Fred E. Turner had himself received as a dividend.

Mrs. Kirkwood did not learn of the compromise agreement between her brother and the bank until after it had been consummated. She then brought two suits, which were consolidated for trial, one for an accounting and one to enforce the trust created by her mother for her benefit in the shares of stock of Eureka Company (i.e., one-half the 3,996 shares owned by her mother). The trial court adjudicated that Mrs. Kirkwood was entitled to receive property equivalent to a one-fourth interest in the assets of the Eureka Company and a one-half interest in the assets of the Homestead Company, subject to payment by her of one-half the amount paid by her brother to the bank. On the appeal, the upper court recognized that the defendant was in effect the purchaser of the stock and real estate sold at the foreclosure sale; then considered whether such purchase was a violation of his duties as fiduciary. It was apparently undisputed that the indebtedness to the bank was in excess of the value of the security. The estate of Julia A. Turner did not have the funds needed to redeem the property from the mortgage and pledge.

The foreclosure sale was held in a proceeding to which Fred E. Turner was a party as defendant, but in which he had no official capacity. At the time of the foreclosure sale, although Fred E. Turner held title as administrator to the property sold, "such property had passed from the jurisdiction of the probate court and from the control of the administrator and was under the jurisdiction of the United States district court in the foreclosure proceeding." The mere fact that he held office as administrator did not preclude him from becoming the purchaser at the foreclosure sale. But this did not dispose of the case. The question still remained whether the defendant had placed himself in a position where his personal interest conflicted with his interest as administrator and as trustee. In the consideration of this question, the court analyzed the compromise agreement made by Turner with the bank and found that Turner was faced with a personal judgment for \$157,982.89, on account of the conversion of the 3,996 shares of Eureka Company stock paid by Homestead Company to Julia A. Turner as a dividend; that this was a liability in tort for which Turner could not enforce contribution or secure indemnity from his mother's estate, or from Mrs. Kirkwood as to the shares of which she was *cestui que trust*; that when Turner agreed to permit the 3,996 shares of Eureka Company stock formerly owned by his mother to be sold by the bank in the foreclosure suit, he was using for his own personal benefit the half portion of the shares held by him as trustee.

As to the real estate and the shares of stock of Old Homestead Company, to which Turner held legal title as administrator, but which had passed out of his control and had become subject to sale in the foreclosure suit through no act or omission on his part, the court held that he did not place himself in a position of conflicting interest by purchasing this property at the foreclosure sale (i.e., from the bank, as purchaser at the foreclosure sale). But as to

the shares of the Eureka Company, which he held as trustee and delivered to the bank to be sold under the decree of foreclosure, he served his self interest in opposition to his duty as trustee, therefore was liable to account.

The decision in *Turner v. Kirkwood* falls far short of holding that a fiduciary is always free to purchase the trust property, or have an interest in such purchase, if the sale happens to be a judicial sale conducted by a commissioner or marshal. The question still remains whether, in relation to such sale, the fiduciary has placed himself in a position where his personal interest is in conflict with his duty as fiduciary.

The case of *Reeves v. Crum*, 97 Okla. 293, 225 Pac. 177, is in no way analogous to the case at bar, likewise *Anderson v. Messinger* (C.C.A. 6), 146 Fed. 929. *Beckman v. Machinery & Supply Co.*, 9 Oh. App. 275, dealt with a private purchase of the mortgaged property by the former receiver from the purchaser at the foreclosure sale, initiated after the sale had been confirmed and the property had passed from the custody of the receiver to that of the new owner.

Reverting to *Starkweather v. Jenner*, 216 U.S. 524, there is a decided difference in the obligations of co-tenants to one another and the obligations of a receiver to the beneficiaries of the receivership estate. Tenants in common have a proprietary interest in the common property and the right to protect such interest, if they act without imposition on their co-tenants. A receiver has or should have no personal interest in the trust property to protect. The relation of tenants in common to the court is that of parties litigant. A receiver owes his standing in the case to the court's order of appointment and is an officer of the court. By virtue of his office the receiver obtains custody and control of the trust property, a possession with which no one can interfere.

Other cases.

In *Jackson v. Smith*, 254 U.S. 586, to remind the court, responsibility for the conduct of the sale rested with the mortgage trustee and not with the receiver. On this ground, the Court of Appeals of the District of Columbia held that the receiver could participate in the purchase made by his associate at the trustee's sale. But this court held to the contrary.

Other cases in which a receiver participated in a purchase of the trust property at a sale conducted by another, but was nevertheless held accountable, are noted as follows:

Nugent v. Nugent (1907) 2 Ch. 292, 76 L.J. Ch. 614, affd. (1908) 1 Ch. 546, 77 L.J. Ch. 271:—sale by a mortgage trustee and purchase by receiver appointed to collect rents.

In re Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809:—sale by sheriff under court decree and purchase of an interest in one parcel of real estate by the receiver and another.

Shadewald v. White, 74 Minn. 208, 77 N. W. 42:—purchase by receiver of certificate of sale from the purchaser at foreclosure sale conducted by sheriff.

Donahue v. Quackenbush, 62 Minn. 132, 64 N.W. 141; 75 Minn. 43, 77 N. W. 430:—sale by sheriff on execution writ (in a proceeding other than that in which the receiver was appointed) and purchase by receiver; resale by the receiver to the defendant Quackenbush. Held, defendant was not a purchaser of the property in good faith and was accountable for its full value.

Cook v. Martin, 75 Ark. 40, 86 S.W. 625:—purchase of receivership property by the receiver (for his wife) from Mrs. Gaines, who in turn purchased the property from Cameron, who in turn purchased the property at an execution sale to enforce the lien of a judgment against the property. Held, that the receiver's

wife should be divested of all interest in the property, upon repayment of the amount expended by her. [On rehearing, held that the creditors had made an election to reject the benefit of the receiver's purchase, by pursuing an inconsistent course.]

II.

The growing crops.

The agreement of sale made between Prudential Insurance Company and Jones prior to the foreclosure sales included the receivers' interest in the growing crops together with the land. When Simkins engineered this agreement, he knew that it could not be consummated and that he could receive no personal reward unless Prudential became the owner of the receivers' interest in the growing crops. No matter that Prudential ultimately paid to the receivers a fair price for their interest in the crops (of which payment, after the low bids made by Prudential for the real estate, Prudential was itself the sole beneficiary), it is clear that prior to the foreclosure sales Simkins had placed himself in an indefensible position of conflicting interest.

That Simkins' self interest became dominant and blinded him to his duty as receiver, there can be no doubt. He did not remain impartial between the plaintiff and the defendants. He knew—and knew that Prudential knew—that Proctor (through Jones) stood committed to buy the Madison County farms at a price substantially in excess of the entire mortgage indebtedness. He knew that the defendants did not have this vital information; but even more, that if he made full disclosure to the defendants and to his co-receiver and to the court, that this would defeat his chances to share in Jones' commission or profit. He chose to take the course dictated by self interest and kept the defendants in the dark, leaving the way clear to Pru-

dential to bid in the 11 farms at a price far below the amount agreed to be paid for these farms by Jones, who in turn was acting as intermediary for a buyer committed to pay even more.

Measure of recovery.

Regarding the measure of recovery against Simkins for his breach of trust, the rule is established by the decision of this court in *Jackson v. Smith*, 254 U.S. 586, as above quoted at page 25. Simkins is liable not only for the profit he himself realized out of the transaction, but also for the profits realized by Jones and Prudential Insurance Company.

In addition, if the court concludes that Simkins was a faithless receiver, he should be surcharged with all fees received from the estate.

III.

The fee-splitting agreement between Simkins and Ingalls.

By the order of the district court entered January 17, 1933 Simkins was allowed \$250 on account for his services as receiver and Ingalls \$250 for his services as counsel for the receiver. Subsequently Simkins received additional compensation of \$1800, without formal court order. April 8, 1941 the district court made an additional allowance of \$2200 to Ingalls for services as attorney for the receivers.

The petitioner excepted to all credits in the receivers' account for fees to either Simkins or Ingalls, because of their agreement to split all fees received in this case. On this subject, the circuit court of appeals said:

"The master found the fee-splitting arrangement reprehensible, and so do we. The court had no infor-

mation in respect to it and the agreement invaded its authority to fix the fees of receivers and counsel as their respective contributions to the receivership activities might require." (R. 392.)

The opinion then goes on to discuss the conflicting loyalties of Harrison and Ingalls, of record as attorneys for the plaintiff and as attorneys for the receivers, but says nothing more about the status of Simkins. However, the court concludes that no credits should be allowed to the receivers for additional attorney fees to either Harrison or Ingalls (each of whom had already received \$250 on account of services as counsel for the receivers). Simkins, who received half of the retainer fees paid by Prudential Insurance Company to Ingalls, and on the other hand paid to Harrison \$1,000 out of his own fees (and rewards received from Jones), was permitted to retain not only the \$250 originally allowed by the court but also the \$1800 paid to himself without formal court order.

It is suggested in the opinion of the circuit court of appeals that the disallowance of additional fees to either Harrison or Ingalls is made to "vindicate the proprieties." Presumably, this refers to the proprieties to be observed by lawyers as officers of the court. It seems to us that the same proprieties apply to a lawyer who accepts appointment as receiver. We are at a loss to find any logical basis for the disallowance of additional fees to either Harrison or Ingalls, while permitting Simkins to retain the \$250 allowed to him by the court and the additional \$1800 paid to himself.

Incidentally, it is suggested in the opinion of the circuit court of appeals that the petitioner is at fault for standing by and permitting Harrison and Ingalls to represent both the plaintiff and the receivers. Perhaps the petitioner should have foreseen that the lawyers would some day find themselves in a position of conflicting interests. But

of the fact that Harrison first approached Simkins, then Simkins selected Ingalls as local attorney, and all three of them secretly agreed what should be their respective roles in the foreclosure proceedings, the opinion of the circuit court of appeals says nothing. On the writ of certiorari granted by this court, the sole issue respecting fees is whether or not Simkins should be ordered to repay the \$2,050 received by him as receiver's fees.

.

In conclusion, we urge that the judgment of the circuit court of appeals should be reversed and the cause remanded to the district court with directions to surcharge the receiver Simkins with (a) all payments received by Simkins from Jones; (b) the commission or profit received by Jones; (c) the amount received by Prudential in excess of the decree indebtedness (or, in the alternative, the amount by which the appraised value of the Madison County farms exceeded the decree indebtedness), and (d) all fees received by Simkins as receiver.

Respectfully submitted,

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CHARLES ELMORE GRIFFIN

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 317

CRITES, INCORPORATED,

petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
RICHARD SIMKINS AND GEORGE FLORENCE,

respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

I.

Nature of Simkins' employment by Jones.

It is argued in respondents' brief (pages 6-8) that in stating the nature of Simkins' employment by Jones we have relied entirely upon Jones' version and failed to take into account Simkins' version; that "Simkins said in substance that the agreement was to assist Jones in closing a deal with Prudential if Prudential bought the farms in at foreclosure sale"; and that the master, who heard these witnesses and observed their demeanor, accepted Simkins' version.

We find no essential conflict between the testimony of Simkins and that of Jones regarding the purpose for which Simkins was employed. Simkins testified that two or three weeks before the foreclosure sale Jones came to see him regarding the possible purchase of the 11 Madison County farms from Prudential Insurance Company (R. 146, 281); that "Jones wanted me to see if they would make any agreement prior to the sale" (R. 147); that Jones said "he would pay me if I could make a deal with Prudential Insurance Company" (R. 123); that Jones told him from the outset that he was buying the farms for someone else, whom he first described as "some Cincinnati parties," but later—before the foreclosure sale—identified by name (R. 146); that it was his understanding that Jones was to receive a "commission" (R. 153); that he, Simkins, was to be paid by Jones only "if it was to be a successful deal" (R. 281); that he received from Jones the first payment of \$500 on July 3, 1933, "to guarantee me as good faith in paying me, that he was in earnest about the transaction. . . . I thought he was doing a good deal of talking about a deal of that size with no money in it, and I insisted that he pay me something as evidence of his good faith." (R. 280.)

Turning now to the report of the special master, to which counsel for the respondents refer, we quote the following:

" . . . It appears that Mr. Jones was a real estate agent who was at the time representing the Proctor interests. In Mr. Simkins' words, Mr. Jones employed Simkins to 'represent him.' Whatever the arrangement may have been, there was a contract drawn up between Mr. Jones and Mr. Simkins wherein the latter agreed to assist the former in the matter. It is apparent also, that on June 25, 1933, at the request of Mr. Jones, Mr. Simkins attended a meeting in a local hotel, where various representatives of the Prudential Insurance Company were conferred with, regarding the possibility of purchasing the Madison County

farms. No definite arrangements were made at that time, and it was not until June 27, 1933 that Jones submitted a written offer to the Prudential and gave a certified check in the sum of \$3,000 to support his offer. The evidence clearly indicates that Mr. Simkins was active in assisting Mr. Jones with his transactions in connection with arrangements to purchase the property from the Prudential. It is also clear that Mr. Simkins was active in completing the transaction by which the client of Mr. Jones became, by purchase from the Prudential after the marshal's sale, the owner of the Madison County lands containing more than 4,000 acres. There is no disputing evidence of any character as to these facts, Mr. Jones and Mr. Simkins both admit them.

"The record shows that for his services Mr. Simkins received a total of \$2,797 from Mr. Jones; \$500 of which was paid on July 3, 1933; \$1,000 on July 8, 1933, and \$1,297 on August 18, 1933. It is indicated that possibly \$200 of the total amount was not paid on account of this transaction, but on account of other legal services performed by Mr. Simkins for Mr. Jones." (R. 78-79.)

The master then goes on to discuss the question whether, under the facts and the law, Simkins violated his trust, to the conclusion that petitioner's tenth exception (R. 52) should be overruled.

"* * * In so doing, the master is of the opinion that the conduct of Receiver Simkins was objectionable in that it was open to, and did cause criticism which, as an officer of this court, it was his duty to avoid; but that under the circumstances, such conduct constituted no violation of this trust which would justify action by this court in the manner requested by the exceptors herein." (R. 89.)

II.

**Alleged disclosure to district judge at time
of confirmation of sale.**

The respondent Simkins, frankly confessing his own omission to disclose to the court or to the petitioner the Jones-Prudential agreement of June 27, 1933 (brief, p. 5, ¶ [c])—let alone his own agreement to cooperate with Jones—seeks comfort from the disclosure said to have been made to Judge Hough on July 18, 1933, upon confirmation of the foreclosure sale (held July 1, 1933). Davis Harrison, attorney for Prudential, testified that “at the time of moving for confirmation I told Judge Hough of the nature of this offer, and of the price.” (R. 265.) Further, that Judge Hough responded: “Harrison, this may be questioned when one or both of us may not be here, and I think as a matter of precaution it would be well to put something on file here embodying this offer.” (R. 265.).

A week later Harrison prepared an affidavit, incorporating a copy of the Jones-Prudential agreement, and mailed it to the clerk of the court to be filed; at the same time, sent a letter to Judge Hough enclosing a copy of the affidavit. (R. 266-267.)

It is intriguing to consider why Harrison saw fit, at the time of confirmation of the foreclosure sale, to bring to the court's attention the agreement of June 27, 1933 between Jones and Prudential. While it is true that the attorneys for petitioner were served with notice of plaintiff's motion to confirm the sale (R. 28-29), the order confirming the sale does not indicate that any objections to plaintiff's motion were presented to the court. (R. 30-31.) Presumably, even in the absence of objections to confirmation of the sale, Harrison had some misgivings about the possible effect of the Jones-Prudential agreement on the

validity of the foreclosure sale and conceived that his statement to Judge Hough might help to protect Prudential against future attack upon the foreclosure sale based on the Jones-Prudential agreement. It seems to us, however, that the testimony of Harrison about his colloquy with Judge Hough boomerangs against Simkins. The crucial point is that Harrison told Judge Hough nothing at all about Simkins' participation in the dealings between Jones and Prudential. (R. 268.) In short, Harrison merely apprised the court that the mortgagee had resold the property at a higher price, but not that the receiver—appointed by the court to protect the interests of all parties—had had an active part, to his personal profit, in the negotiations between Jones and Prudential prior to the foreclosure sale; and that the receiver, in course of this personal employment, had acquired material information which as receiver it was his duty to divulge to the court, his co-receiver and to the petitioner, but which he chose to secrete.

The order confirming the sale merely passed upon the sufficiency of the marshal's return to the order of the sale, and recited that upon examination of said return the court finds "that the former orders of this court, as to the appraisal of said real estate and the advertisement of the sale have been complied with in every respect, and finds that the proceedings of the United States marshal have in all respects conformed to the statutes made and provided in such cases, and to the former orders of the court." (R. 30.)

Not only did Harrison fail to inform Judge Hough of Simkins' participation and profit in the transaction; but, although he saw fit to make some sort of disclosure, nevertheless stopped short and failed to state that Colonel Proctor of Cincinnati was the actual buyer of the property, a fact known to Harrison at least a week prior to the confirmation of sale. (R. 247—letter of Jones to Har-

risson, July 10, 1933.) The partial disclosure made by Harrison to Judge Hough on July 18, 1933 in no way absolves Simkins, who although present in court added nothing to Harrison's statement. (R. 286.)

III.

The growing crops.

Respondents argue that the growing crops were sold pursuant to an order of the court directing that the crops be sold to Prudential at stipulated prices, therefore no question can be raised on the sale of the crops. (Brief, 48-49.) This argument is beside the point. Prior to the foreclosure sale, Simkins had already placed himself in a position where his personal profit depended upon consummation of a sale by Prudential to Proctor (through Jones) of the 11 Madison County farms, *together with the receivers' interest in the growing crops thereon*. When Judge Hough approved the sale of the receivers' interest in the crops to Prudential, he had no inkling that one of the receivers had a personal interest in this sale. By his order to sell the crops to Prudential, he certainly did not mean to sanction Simkins' conduct, or to help him garner a personal profit. And with respect to the crops, as we have already argued, Simkins was himself a seller (in association with his co-receiver, George Florence, who had no part in the dealings with Jones and no knowledge thereof).

IV.

Petitioner's alleged laches.

The "first and final account of receivers," to which petitioner's exceptions were directed (R. 38-45, 50-63), was informally handed to Judge Hough on April 19, 1934. (R. 36.) Shortly thereafter a copy of the account was

furnished to Prudential, in order to give Prudential's auditors opportunity to check the various items, and the formal presentation of the account to the court was held in abeyance to see whether Prudential had any objections. (R. 36, 229-232.) Sharp differences arose between Prudential and the receivers on the receivers' expense charges; and further, Prudential challenged the fee demand made by Ingalls as one of the attorneys for the receivers. (R. 47-48; R. 231-232.) These differences were not reconciled prior to the death of Judge Hough (in November 1935), nor for a considerable period after Judge Underwood was inducted (in April 1936). Finally, upon the insistence of Ingalls, the receivers' account was filed February 19, 1937, and at the same time Ingalls' own application for fees. (R. 33-38; R. 38-45.) An order was entered May 13, 1937 for a hearing on the receivers' final account to be held June 2, 1937. (R. 46.)

The petitioner was not furnished with a copy of the receivers' account and knew nothing of the informal proceedings before Judge Hough. By letter of Harrison, dated May 25, 1937, counsel for the petitioner were informed that a hearing on the receivers' account was to be held June 2, 1937. (R. 107, 121.)

When the hearing on the receivers' account began before Judge Underwood (R. 106) and it quickly became apparent that the hearing would not be of routine character, but would involve the conduct of Simkins in relation to the foreclosure sale, Judge Underwood decided to refer the whole matter to a special master. At the hearing before the master, counsel for the petitioner were afforded opportunity to examine Jones and Simkins regarding the circumstances surrounding the foreclosure sale. After the examination of Jones on July 11, 1937 and the examination of Simkins on June 30, 1937, petitioner was permitted to file its exceptions to the receivers' account. (R. 50-63.)

It is vaguely suggested in respondent's brief that, prior to the 1937 hearing, petitioner already had adequate information upon which to initiate independent proceedings to set aside the confirmation of the foreclosure sale, or to charge Simkins and Prudential Insurance Company with fraud. The record shows merely that some time in 1935 counsel for the petitioner for the first time became aware that Simkins had some part in the resale of the 11 Madison County farms by Prudential to Proctor; that this discovery was made in course of other litigation, wherein Jones appeared as a witness and was examined to a limited extent regarding his dealings with Simkins. (R. 153-154.) Certainly it cannot be said from anything that appears in the record of this case that the partial discovery made by petitioner's counsel in 1935 regarding Simkins' dealings with Jones was sufficient to enable petitioner immediately to start some sort of an action in equity against Simkins and Prudential Insurance Company.

No claim of laches was asserted by the respondents in the trial court, nor in the circuit court of appeals. It is stated in the opinion of the circuit court of appeals that the petitioner "stood by for years doing nothing either to prevent or correct the situation," but this statement refers to the impropriety of permitting Harrison and Ingalls to act as attorneys for both the plaintiff and the receivers. It has no reference whatever to the complaint of the petitioner regarding the conduct of Simkins.

Respondents do not claim that there was any change in position or that any rights intervened which made it inequitable in 1937 to review the conduct of Simkins as receiver. It is suggested that Simkins was prejudiced by the delay, because of his own faulty memory and the difficulty of other witnesses in recalling what happened in 1933. Quite ironically, Simkins argues in effect that the petitioner should have prodded him to file and present his statement of account as receiver at an earlier time, forget-

ting that the delay was due entirely to the differences which arose between the receivers and Prudential Insurance Company. Even if an issue of laches could now be raised, the record clearly shows that the fault for delay rests entirely with the respondents themselves.

V.

Respondents' citations of authorities.

Except for the cases already cited in the opinion of the circuit court of appeals, the respondents cite six cases upon which we comment briefly as follows:

Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 23 L. ed. 328:—Loan by director to corporation, on security of a mortgage; default and foreclosure of the mortgage; purchase of the mortgaged property by defendant through agent at the foreclosure sale; bill in equity, four years after the sale, to hold defendant as trustee for the corporation.

Held: that the loan was fair and made without fraud; that the purchase of the property at the foreclosure sale was the only recourse of the defendant to obtain repayment of the money; that the defendant had no information at the time of the sale which was not as well known to the other interested parties; that the purchase made by defendant was not absolutely void, but voidable even on slight grounds of unfair dealings; that in this case, however, upon the closest scrutiny, the conduct of the defendant was unimpeachable; that even if plaintiff had the right to avoid the sale, it could not do so after waiting four years to speculate upon the rise or fall in value of the property, when all the facts on which the alleged right to avoid the purchase were known as soon as the sale was made.

Allen v. Gillette, 127 U.S. 589, 32 L. ed. 271:—Whether Gillette, executor of the will of James Morgan, plaintiff's grandfather, could buy for his own account plaintiff's interest in real estate devised to her by her grandfather, at mortgage trustee's sale to foreclose the mortgage executed by the plaintiff.

Held: that the property formed no part of the estate in defendant's charge and the mortgage debt was not a liability of the estate; that the defendant had nothing to do with the mortgage trustee's sale, except as bidder; that there was no element of fraud in the case; that the mere act of bidding for the property at the mortgage trustee's sale was not a violation of any fiduciary duty of the defendant as executor.

Pewabic Mining Co. v. Mason, 145 U.S. 339, 36 L. ed. 732:—Purchase by minority stockholders of all assets, at judicial sale in proceedings to liquidate corporation; objection to confirmation of the sale by majority stockholders.

Held: that the purchase was made without fraud or deception of any kind; that the successful bidders did not require leave of court to entitle them to bid, since they were not the vendors; that the complainants did not stand in any fiduciary relationship to the defendants which precluded them from bidding freely for themselves at the master's sale; that other objections to the time and manner of the sale were properly overruled by the circuit court.

Steinbeck v. Bon Homme Mining Co. (C.C.A. 8), 152 Fed. 333:—Agent bought part of company's property at tax sale, also tax certificate covering other property; made full disclosure to his principal and gave principal opportunity to redeem, which was not accepted; but after the agent had prospected and developed the property, so that it became valuable, the company claimed ownership.

Held: after the company, with full knowledge of the facts which conditioned its right to elect to avoid the tax title, rejected the agent's offer to turn over the property upon payment of the agent's cost, it could not years later take advantage of the increased value due to the expenditures, toil and energy of the agent.

DeJarnatt v. Peake, 123 Cal. 607, 56 Pac. 467:—Defendant sought to avoid payment of commission to plaintiff, for his services in connection with defendant's purchase of mortgage, on ground that plaintiff was receiver in proceeding to foreclose the mortgage.

Held: that the transaction was free from fraud and there was no complaint by the creditors of the deceased mortgagor; that there was no ground upon which the defendant should be permitted to escape payment of the agreed commission.

Mercantile Trust Co. v. Sunset Road Oil Co., 50 Cal. App. 485, 195 Pac. 466:—In no way pertinent to any of the issues in the case at bar.

. . .

It is not enough to say that, since Simkins did not conduct the foreclosure sale, he had no fiduciary duties in relation to the sale. The fact that the marshal conducted the sale did not relieve Simkins of his abiding obligation, while he held office as receiver, to deal impartially as between the mortgagee and the owner of the equity; not to accept secret employment, as ally of Jones, to bring about a definite arrangement under which Jones (for Proctor) could acquire the Madison County farms directly from Prudential, by-pass the foreclosure sale, and avoid any bargaining with petitioner; not to accept concurrent personal employment which brought to him the knowledge that there was available a prospective purchaser of the farms willing to pay substantially more than the decree indebtedness, but made it to his personal interest to keep this information away from the petitioner, his co-receiver and the court,—information which, if immediately and candidly divulged, undoubtedly would have changed the entire course of the foreclosure proceedings.

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No. 317.

Supreme Court of the United States

COMMENCE TERM, A. D. 1942.

UNITED STATES TRUST COMPANY, INCORPORATED,

Petitioner,

vs.

**PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AND GEORGE FLORENCE AND RICHARD
SIMKINS,**

Respondents.

BRIEF IN BEHALF OF RESPONDENTS.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 317.

CRITES, INCORPORATED,

Petitioner,

vs.

**PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AND GEORGE FLORENCE AND RICHARD
SIMKINS,**

Respondents.

BRIEF IN BEHALF OF RESPONDENTS.

Respondents receivers are filing a cross-petition in this cause in which they are designated as petitioners. In this matter, an application was made by the receivers to this court for an extension of time to file a cross-petition and also to file an answer to the petition of Crites, Inc., and an extension was granted by one of the associate justices of this court until the fourth day of October, 1943.

CORRECTED STATEMENT OF FACTS.

There are some errors in petitioner's statement which should not be permitted to go by uncorrected. Having reference to petitioner's petition (p. 2) Crites would have this court believe that Simkins had engineered and maneuvered a contract for Prudential in advance of the sale.

The testimony of Simkins (R., 144-160), particularly on page 145 when Simkins testifies that Jones came to see him prior to the foreclosure sale and asked if it was possible to buy the farms as a single unit. "I told him that as receivers we had nothing to do with the sales." (R., 147.) "He told me that his party would only be interested if he could buy this land as a whole and he asked me if Prudential bought these farms in if I would assist him in closing the deal with the Prudential." Jones (R., 204-205) and particularly R., 206, "I went to see him and told him that he was an attorney in the matter and that I was interested in trying to buy the land and he told me that he was in no position to offer it to anybody right now, not until after the foreclosure and the Prudential acquired title to it and then that he would be in a position to offer it to anybody."

R., 238, will show that the actual cash received for the foreclosure was \$249,106.00 instead of the \$281,000.00 as alleged by petitioners on page three of its petition.

Petitioner on page three (3) alleges that Simkins had a fee-splitting arrangement with Ingalls and Harrison. The master (R., 91) states that there is no doubt that there was a mutual understanding between the parties referred to by which it was agreed that they should propose the

appointment as alleged, likewise there is no doubt that Ingalls and Simkins agreed to share their fees and pursuant to that agreement Ingalls did pay to Simkins a substantial sum from the pay received as the attorney for the Prudential, but there is no place where the master finds there was an agreement between the three of them to divide fees, and petitioner can not point to any place in the record where it shows that there was such an agreement, nor did the master make a finding that there was any division of fees arising out of the trust estate.

This subject is dealt with at length in respondents' cross-petition and supporting brief.

On page (4) of Crites petition it states that the District Court concluded as a matter of law that the conduct of the receiver, Simkins, was objectionable. We challenge the petitioner to produce from the record any evidence of any such conclusion made by the District Court.

The master (R., 91) states that it has been found that the receiver, Simkins, has not been guilty of any breach of trust or misconduct which would justify the charge of objectionable conduct against the receiver.

And the District Court confirmed the master's report, denied the exceptions and approved the receivers accounts, which is the best evidence that the District Court did not say that the conduct of Simkins was objectionable.

ARGUMENT.

Number one question presented by the petitioners petition (page 5) is misleading. The proper question based upon the facts shown by the record is as follows:

May one of the two co-receivers in a foreclosure proceeding, this co-receiver being an attorney, with impunity while acting as such receiver for the collection of rents and profits only, accept legal employment from a real estate agent who is intent upon purchasing the real estate in question from the Prudential Insurance Company of America, the mortgagee, who becomes the purchaser at the marshal's sale; and could said attorney co-receiver accept compensation from this real estate agent without notifying the court, his co-receiver and appellant? The lower courts answered yes. The appellant contends that it should be answered no.

The answer to this question is found in special master's report (R., 78-89).

The Circuit Court of Appeals of the Sixth Circuit found that

"the receiver was a fiduciary and in situations like the present a trustee, whose obligations extend not only to the mortgagee but likewise to the mortgagor or others interested, and that a fiduciary may not purchase or be interested in the purchase of property for his own benefit against the claims of his beneficiary and that no one can be both buyer and seller in the same transaction, but says that the rule is subject, however, to this modification,—that where the sale of trust property is made pursuant to a decree of the court, by a special commissioner or other agent appointed by the court, the fiduciary has the right and privilege of purchasing. In such cases the reason for the rule, to wit: a conflict between personal interests

and fiduciary duties of the trustee, is absent, so the rule does not apply."

"It will be observed that the present receivers were limited in authority and so in obligation. By the terms of their appointment they were authorized to collect the rents and profits from the farms and to operate and manage them; that they had no authority to dispose of the real estate; had nothing to do with bringing about the sale and no control over the manner in which it was carried on. They were not in any sense liquidating receivers. Simkins did not stand, in respect to the mortgaged property, in the petition of both buyer and seller, nor was anything done by him or those with whom he was associated, to stifle bidding at the sale. It is perfectly clear upon the record that Proctor was not at any time a prospective bidder. Under the decrees, the farms could only be sold separately. Proctor was interested only in the Madison county acreage as a single parcel, and in its purchase only if he could obtain a warranty deed from Prudential. For this he was able and willing to pay. The knowledge of Proctor's interest in the property withheld from Crites could have been of no value to it if disclosed."

The Supreme Court has consistently sustained the findings of the lower court in this matter in well considered opinions.

Twin Lick Oil Co. v. Marbury, 91 U. S., 587;
Allen v. Gillette, 127 U. S., 589;
Pewabic Mining Co. v. Mason, 145 U. S., 349;
Starkweather v. Jenner, 216 U. S., 524.

The most interesting state case is Reeves v. Crum, 97 Okla., 293, 225 P., 177. This case very minutely differentiates Jackson v. Smith, 254 U. S., 586.

The Supreme Court citations above answer Crites second question (p. 6).

The third question (p. 6) is "Is a receiver entitled to compensation as a receiver where he has entered into a

secret agreement with plaintiff's attorney in advance for a division of all fees that might be received?" Crites in its petition said Simkins had fee-splitting arrangements with Ingalls and Harrison but in this question number three, it says plaintiff's attorney and evidently Ingalls is meant.

The master did not recommend disallowance of a reasonable fee to Ingalls and the District Court did, later on, with full knowledge, make allowance of twenty-two hundred (\$2200.00) dollars.

The testimony in the record (R., 407) is that Ingalls was approached by Simkins and asked to join with Harrison as counsel for the Prudential and asked one-half of the fees paid by the Prudential as a division between forwarder and receiver. So one-half of the fees paid by the Prudential for the bringing of the action was paid to Simkins. There was no other division of money coming out of the trust, or otherwise, nor any attempts or suggestions of division of such funds appearing in the record.

(R., 116.) (R., 143.) The best evidence that there was no general agreement to divide fees arising out of the trust estate as found by the Circuit Court of Appeals is brought out by the following:

Simkins in April, 1934, drew a fee of eighteen hundred (\$1800.00) dollars as receiver which Ingalls knew nothing about until December, 1935 (R., 116), and Harrison (R., 230), who was present in April, 1934, when the fees were paid to the receivers would naturally have seen to it that Ingalls and himself were paid attorney fees if there had been a general agreement to divide fees.

Furthermore, if there had been an agreement to divide fees between the three, Harrison would not have on June 7, 1937 (R., 125) and (R., 264) in behalf of the Prudential

have filed objections to Ingalls' application for fees. If Ingalls were to have divided fees out of the receivership estate with Simkins, Simkins would have seen to it that Ingalls was paid a counsel fee at the same time he drew eighteen hundred (\$1800.00) dollars.

Harrison drew two hundred fifty (\$250.00) dollars in fees and made no further application so it can be assumed that he was paid by the Prudential. There was no demand by Harrison or Simkins upon Ingalls to divide the twenty-two hundred (\$2200.00) dollars that was ordered by the lower court in 1940.

In fact, the entire record absolutely disproves that there was a general agreement other than the agreement between Ingalls and Simkins to divide fees paid by the Prudential, which agreement in no sense invaded the authority of the court to fix the fees of the receivers and counsel, which practice was found objectionable in the case of *Weil v. Neary*, 278 U. S., 160, cited by the Circuit Court of Appeals as its authority for the refusal to allow further counsel fees. In the *Weil* case there was a contract between the attorney for the trustee and Untermeyer, attorney for the creditor, whereby the compensation to be allowed the attorney for the trustee and the work done should be performed under Untermeyer's supervision, which, of course, was contrary to public policy and professional ethics. This agreement was void under Rule 42 of the Bankruptcy Act as well.

Corpus Juris Secundum, Volume 7, page 1034, says that it is not unethical or illegal for one attorney to divide fees with another attorney except where the agreement is against public policy and in bankruptcy agreements.

In the instant case, the agreement between Ingalls and Simkins did not invade the authority of the court to fix

the fees, and the court will observe that there was no division whatsoever of fees coming out of the trust estate.

The Circuit Court of Appeals in its decision (R., 393) cited *Woods v. City National Bank*, 312 U. S., 262. This is another bankruptcy case where the division of fees was made between counsel who were hostile and represented conflicting interests. The court in that case says that those expenditures should be allowed which had clearly benefited the estate.

Now of the courts, which is the better one to determine whether or not counsel have violated the proprieties and determine whether or not there has been divided allegiance and fee-splitting which invaded the authority of the court to fix the fees? Our contention is that the master and lower court who have the opportunity to hear and observe the witnesses.

This court in *Trustee v. Greenough*, 25 U. S., 527, 537, where this subject is discussed, has stated that the action of the court below in this respect is treated as presumably correct.

Now, the lower court, in 1940, heard an application for compensation by O. C. Ingalls for services rendered up to May 25, 1939, and after a hearing in open court, the only opposition was made by Crites, Inc., the District Court with full knowledge of the so-called divided allegiance and fee-splitting, allowed Ingalls twenty-two hundred (\$2200.00) dollars compensation up to that date.

In the hearing upon Ingalls' fees (R., 403-404) Crites when asked by the court stated that their objection to the allowance of Ingalls' fee was because most of his time had been spent in defending the receivers' accounts against exceptions filed. (R., 404.) The court specifically asked In-

galls if he had participated in any manner with Simkins and Ingalls said he had not.

The master did not find fee-splitting reprehensible as stated by the Circuit Court of Appeals, although he did say that Judge Hough had no knowledge or information as to the fee-splitting arrangement and to that extent was imposed upon (R., 92).

Judge Hough allowed a fee of two hundred fifty (\$250.00) dollars which was allowed to stand by the Circuit Court of Appeals. The Circuit Court of Appeals admitted (R., 393) that Judge Hough knew of the dual allegiance when he allowed the two hundred fifty (\$250.00) dollars fee but did not know of the fee-splitting arrangements and we contend that there is nothing in the record to show that he did not know of the fee-splitting arrangement and there is no just assumption on the part of the master (R., 92) that Judge Hough was not advised of the agreement.

The only place in the record where that has been discussed was (R., 280) when Simkins was asked if he had told the court about the division of fees with anyone and he answered "No, I don't think so."

The statement made in petitioners supporting brief (p. 13) that the court below found the fee-division reprehensible is untrue. The court simply approved the receivers' accounts and made no comment concerning the fee-splitting arrangement.

CONCLUSION.

The master who heard the testimony (R., 89) found that Simkins was not guilty of breach of conduct or trust which could bar him from reasonable compensation for his services.

The lower court allowed receivers fees for services and approved their accounts and the Circuit Court of Appeals found no merit in other exceptions to the receivers accounts save to the allowance of attorney fees which they disallowed.

They found the itemization for traveling expenses and stenographic fees appearing reasonable and have the sanction of consent of the master and the judge.

They failed to show any fraud or connivance in the operations of the receivers and sustained the opinion of the lower court, and therefore we urge that the petition for certiorari on behalf of Crites, Incorporated, be disallowed and that the cross-petition of the receivers be allowed.

Respectfully submitted,

RALPH G. MARTIN,
Counsel for Petitioner.

OSMER C. INGALLS,
Of Counsel.



FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 317.

CRITES, INCORPORATED,

Petitioner,

vs.

**THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, RICHARD SIMKINS AND GEORGE
FLORENCE,**

Respondents.

**On Writ of Certiorari to the United States Circuit Court
of Appeals for the Sixth Circuit.**

RESPONDENTS' BRIEF.

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Respondents.

RESPONDENTS' BRIEF.

STATEMENT.

In compliance with Rule 27, paragraph 4, respondents limit their statement to what they deem "necessary in correcting any inaccuracy or omission in the statement on the other side."

That portion of petitioner's statement which is headed "Judgment" and extends to and ends on page 4 of its brief on the merits is entirely accurate. Respondents conceive that several material inaccuracies and omissions characterize the petitioner's statement of "Facts," commencing on page 4, and the supposedly factual statements contained under the heading "Argument," commencing on page 16 thereof.

1. "The opinion of the Circuit Court of Appeals fails to show that, while these 11 farms were mortgaged to Prudential for \$192,000, an offer to purchase these farms for \$500,000 was made to Henry W. Crites by Edwin Jones, representing J. C. Penny of New York (R., 201)." (Petitioner's brief, p. 5, top.)

"The reason why Jones sought the cooperation of the receiver Simkins, rather than to bargain directly with the owner of the equity, may be traced to the fact that only two years previously Jones had made an offer for these same farms, on behalf of another client, of \$500,000 and this offer had been rejected (R., 201-202)." (Petition for certiorari, p. 3.)

The record (201-202) does not show when this offer was made, closer than "a year or more" "prior to 1933"; and, in any view, this and all other courts of the country take notice of the notorious fact that generally accepted values of farm properties in Ohio and elsewhere shrank very greatly indeed, during the period of two years or more prior to the spring of 1933. If this prior offer of \$500,000 is to be taken into account at all (and respond-

ent submits it should not be), it should be weighed with the fact that an offer of approximately \$140,000 for the Madison county properties, here involved, was made to the Prudential after the commencement of foreclosure proceedings, but before the decree of foreclosure (R., 270-271), and that the lands were appraised for foreclosure sales at an aggregate value of approximately \$244,000 (R.,).

2. "On June 27, 1933, unknown to the defendant Orites, Inc., or to the District Court, a contract for the purchase of the 11 farms from Prudential was signed by Edwin Jones . . . (R., 61)." (Petitioner's brief on merits, p. 5 (bottom); emphasis ours.)

"As afterwards learned by the petitioner, when Prudential took its deficiency decree it already had in hand a contract for the sale of the farms—procured by the receiver Simkins before the foreclosure sales—at \$249,000 . . . (R., 288, 289, 61-3, 154-5).

Simkins negotiated a written agreement with Prudential, contingent upon acquisition of title by Prudential at the impending foreclosure sale." (Petition for certiorari, p. 2; emphasis partly in the original and partly ours.)

When this statement, as made more definite in point of time by the brief than it had been in the petition, is read as a whole, it is incomplete, in the view of respondents, in that it does not in itself show that, while Jones' offer was in the hands of representatives of the Prudential shortly before the sale of July 1, 1933, that was after the entry of the decree pro confesso (May 2, 1933; R., 24-26).

The statement as a whole is inaccurate in the following material respects:

(a) There was no contract between Jones and Prudential on June 27, nor at any time prior to the sales. The written document referred to by petitioner (R., 61) was an offer by Jones to Prudential transmitted through Little at Circleville, Ohio, to Prudential's principal office at Newark, New Jersey (R., 63, 227), and there accepted by Prudential's officers on July 3, 1933, after the sales but before confirmation.

(b) The statement that Simkins had "negotiated" this contract or offer, contained in the petition for certiorari, omitted from the statement of facts in petitioner's brief on the merits, but drawn into the argument in that brief by innuendo (see pp. 18, 19) is inaccurate, as respondents conceive.

What Simkins had done in this connection was as follows:

On June 25, at Jones' request, Simkins met Jones at the Neil House, in Columbus, Ohio. Simkins induced Simerman (a "field man" for Prudential; R., 153, 242, 243) to call Little (farm loan manager of the Indiana branch of Prudential; R., 224, 225) by long-distance telephone (R., 287; see R., 319, 320, exhibit received, R., 294). On the next day Simkins had another conference with Simerman and Jones (R., 320). On June 27, Simkins went again at Jones' request to the Neil House in Columbus, to meet Sawyer, the attorney for Jones' principal; but Sawyer did not come (R., 287). Later in the

same day, the written offer was signed by Jones and witnessed by Simkins and Mrs. Lutz in Simkins' office in Circleville (R., 63, 193), and enclosed in a letter addressed to Little and signed by Simkins (R., 288; received, R., 289). This letter refers to statements made by Jones concerning his buyer, and to a telephone conference in which it is fairly inferable that Simkins participated. Simkins retained, after the lapse of time, no independent recollection of what transpired in his office (R., 282). It is certain that the written offer was not prepared there or by him (R., 193, 194, 210-212, incl., 280, 282, 288, 289) as shown by the testimony of Mrs. Lutz, a perfectly disinterested witness; and that it was not at the Neil House earlier in the day (R., 153, 210). The statement that Simkins negotiated the offer is also contrary to Jones' testimony (R., 210; see R., 205).

So, a more accurate statement of Simkins' connection with Jones' written offer would be that Simkins on Jones' behalf, persuaded Simerman to interest Little, and, with Simerman, vouched to Little for the responsibility of Jones and his buyer; and acted as a witness on the instrument and as a transmitting attorney for Jones. In a sense, these acts might be characterized as participation in Jones' negotiations; but the record is clear that Simkins had nothing to do with the terms of the offer.

(c) The statement that the offer dated June 27, 1933, was "unknown to the defendant, Crites, Inc., or to the District Court", is true as of June 27 and as of the date of the sale, July 1. The statement is incomplete in that it does not allude to the disclosure of the facts in open

hearing on confirmation, July 18, 1933. Indeed petitioner's statement of facts as a whole is incomplete with respect to information given to Crites, Inc., and to the District Court; notwithstanding which the case is argued extensively at page 17 to 23, inclusive, on the footing of non-disclosure.

The facts with respect to information given or available to the petitioner and the District Court will be subsequently stated herein.

3. The statement concerning the agreement between Simkins and Jones, commencing with the quotation from Jones' testimony at R., 206, on page 6 of petitioner's brief and extending to the end of the paragraph at the top of page 7 is accurate, but incomplete. Quite inaccurate, however, had been the corresponding statement of the petition for certiorari (page 2) viz.:

"Simkins entered into a contract of employment with Jones under which Simkins was to procure the farms for Jones' principal, William Proctor, and Jones was to pay Simkins a share of his commissions."

The striking contrast between the measured statement of the brief and the looser and unwarranted language of the petition speaks for itself. Simkins did not know who Jones' principal was, when he entered into the agreement with Jones (R., 146, 150, 206, 209, 282); and the statement that Simkins was to have a share of Jones' commissions in the sense of a proportion or aliquot part, is wholly at variance with the evidence. (A similar statement, though eliminated from the "statement of

facts," in petitioner's brief, has unfortunately crept into the argument, at p. 18 of the brief.)

However, even the modified statement at pp. 6 and 7 of petitioner's brief, concerning Simkins' agreement with Jones, is incomplete, and consequently misleading, in that it is predicated entirely upon Jones' version (R., 207) and fails to take into account Simkins' version (R., 145, 146, 147). Jones said that the agreement was that Simkins was to help him in "acquiring this farm, and any other services in the way of legal work" (R., 207; emphasis ours). Simkins said in substance that the agreement was to assist Jones in closing a deal with Prudential if Prudential bought the farms in at foreclosure sale (R., 147). The master, who heard these witnesses and observed their demeanor, accepted Simkins' version (R., 78). His conclusion is supported by the fact that Jones himself testified positively that his principal, Proctor, had insisted on a general warranty deed from Prudential (R., 221) and had authorized him to buy the Madison county farms "only . . . as a whole" (R., 220).

So, respondents respectfully submit that in this court the fact respecting the scope of Simkins' original employment by Jones must be taken to be this:

That Simkins was to assist Jones as an attorney in dealing with Prudential for the Madison county farms as a unit, if Prudential should buy them all in, and in rendering other legal-services to Jones in closing the deal, if made; to which may be added that actually Simkins assisted Jones in preliminary negotiations before Prudential acquired title to the farms, to the extent and

in the manner hereinabove stated. Also, that Simkins was to be paid by Jones for services, not to share in Jones' commissions, as such.

4. "The record does not show directly the amount agreed to be paid and ultimately paid by Proctor for the 11 farms, but the documentary tax stamps on the deed from Prudential to Proctor's nominee, Mary E. Johnston, indicated payment **by Proctor** of approximately \$281,000 (R., 346); **presumably**, \$249,106 net to Prudential, in accordance with the Jones-Prudential **contract** of June 27, 1933, and the difference of \$31,894 to Jones. (See testimony of Jones about payments received by him from Proctor—R., 219.)" (Petitioner's brief, p. 7; emphasis ours.)

This statement is replete with inferences and suggestions which may or may not be true, viz.:

(a) That Mary E. Johnston was a **gratuitous** nominee of Proctor. This may have been the fact; yet for aught that appears, there may have been a valuable consideration moving from Mary E. Johnston to Proctor and entering into the amount of \$281,000 indicated by the revenue stamps on the deed. She may have been a subvendee.

(b) That the revenue stamps correctly indicated the total amount actually paid.

(c) That **Proctor** alone paid \$281,000.

(d) That Jones received a difference of \$31,894. Jones did not so testify (R., 219). He did receive \$15,000 and an additional amount which he did not remember.

Also, the amount received by Prudential on its resale was \$249,106; this is not a "presumption"; it is estab-

lished by the evidence (R., 243, 244, 328); affidavit admitted, R., 310).

5. "In the opinion of the Circuit Court of Appeals it is stated as an absolute matter of fact that Proctor was not a prospective bidder at the marshal's sale (R., 389); and that although Jones was present at the marshal's sale he did not bid because he lacked authority to do so (R., 390). All that appears in the record in support of these assertions is the testimony of Jones himself that he was not authorized by his prospective purchaser to buy the 11 Madison county farms aggregating 4,844 acres, except as a whole (R., 220). However, Jones further testified that he never told Simkins and the Prudential Insurance Company he was only interested in buying the 4,844 acres as a unit (R., 221)."

This somewhat argumentative statement, in which a finding of fact by the Circuit Court of Appeals is sought to be impeached, is incomplete, and therefore also inaccurate. In the first place the special master thoroughly considered this question of fact and clearly stated his findings thereon as follows:

"3. That the Proctor interests were not prospective buyers at the marshal's sale because of the fact that they demanded a warranty deed supported by the Prudential Insurance Company and for the whole tract.

4. That there is no substantial evidence to support an inference of controlled bidding or illegal conspiracy with reference thereto." (R., 104.)

In the second place, if this court should be disposed to go behind the findings of fact of the master (approved by the District Court) and the Circuit Court of Appeals the court will discover that Jones did not testify that he

had not told the Prudential Insurance Company he was only interested in buying the 11 farms as a unit (R., 221). He did say that he had never talked to Simkins about that; on which point Simkins contradicted Jones, as hereinbefore stated in paragraph 3 hereof. The whole course of dealing between the parties indicates that Jones was interested only in purchasing from Prudential, on behalf of his principal, should Prudential acquire the lands at the sales, and was therefore not a prospective bidder in his own behalf or for his principal, at the foreclosure sales; this conclusion does not depend solely upon the one statement alluded to by the petitioner.

6. "By force of the contract made with Prudential on June 27, 1933, under which he was bound to take the 11 farms from Prudential at a net price of \$249,106 Jones had cut himself off as a possible bidder at the foreclosure sale. What Jones or Proctor might otherwise have done, if this contract had not been made, seems to rest entirely in argument and speculation."

This statement is entirely inaccurate. In the first place as pointed out under paragraph 2, supra, Jones had no contract with Prudential until after the sale, on July 3, 1933. In the second place what has just been stated concerning the facts of record shows that Jones was never a possible bidder at the foreclosure sale, nor was Proctor.

7. "In contrast with the dealings between Simkins, Jones and Prudential, the evidence shows that prior to the foreclosure sales another prospective purchaser wrote a letter to Prudential inquiring whether the Madison county farms could be purchased at private sale, but at a price unattractive to

Prudential. In this instance, the answer was that Prudential did not own the property and was in no position to make any sale, that any sale would have to be worked out with the owner of the equity, Crites, Inc. (R., 271.)"

This argumentative statement is incomplete as hereinbefore indicated (p. 2).

8. The statement at page 8 of petitioner's brief concerning the amounts paid by Jones to Simkins is entirely correct, but incomplete. There should be added the statement that these payments were made by checks of Jones' father (R., 208); that the first of them was exacted by Simkins as a retaining fee or earnest money, and before Simkins or Jones knew that Jones' offer had been accepted (R., 280) and that, while Jones testifies (R., 219) that the amounts which he paid to Simkins came indirectly from money which Jones received from Proctor, most if not all of these payments were made before Jones had received any money from Proctor.

9. Apparently objecting to the Circuit Court of Appeals' description of Simkins' service to Jones as that of an attorney, petitioner, in its brief at pp. 8 and 9, refers again to Jones' version of the nature of the employment, on which respondents have previously commented (p. 7, supra); omitting, however, Jones' own words, which are:

"Helping me in getting this farm, acquiring the farm, and any other services in the way of legal work,"
and which show that Jones himself conceived of Simkins' role as "legal work."

Thereupon petitioner correctly states that Simkins did not examine the title or represent Proctor in the transaction. But it has never been claimed by or on behalf of Simkins, that he at any time represented Proctor in the transaction or did any work for Proctor. He was employed by Jones; and at the closing of the deal between Proctor, Jones and the Prudential, Simkins represented Jones and rendered services on his behalf (R., 217, 149-150; see also a letter from Simkins to Little, July 19, 1933; R., 248; exhibit received, R., 248); Among other services which Simkins rendered to Jones were these, as described in Simkins' language (R., 150):

"He was in debt several places, and they attached his money, and different creditors of his tried to reach his money, and I telephone around for him".

So respondents submit that the fact of record is that Simkins agreed to represent and actually did represent Jones as an attorney; that the evidence repels any inference that he was a partner, joint venturer or associate broker with Jones; and that the findings and opinions of the lower tribunals on this point are correct and should not be disturbed.

The paragraph upon which comment has just been made concludes the statement of facts as it appears in petitioner's brief. As previously indicated, a number of factual statements occur in the course of the argument in the brief at pages 16 to 23, inclusive, which are not found in the statement of facts. Some of these may be interpreted as argumentative or inferential, especially those which discuss the supposed state of mind of the

parties and impute motives. Comment on all of such statement will be postponed. However, certain very specific statements of fact are made which require amplification and correction.

10. "The petitioner and the district judge were informed at the most, only that an unrevealed prospective purchaser wanted to buy (at an undisclosed price) the 11 farms as a unit, which it was assumed the court could not accomplish." (Petitioner's brief, p. 19.)

"He (Simkins) knew—and knew that Prudential knew—that Proctor (through Jones) stood committed to buy the Madison county farms at a price substantially in excess of the entire mortgage indebtedness. He knew that defendants did not have this vital information; but even more, that if he made full disclosure to the defendants and to his co-receiver and to the court, that this would defeat his chances to share in Jones' commission or profit. He chose to take the course dictated by self-interest and kept the defendants in the dark."

Thus, arguments are built up on the factual premises of non-disclosure or incomplete disclosure on the part of Simkins, without any reference to the record evidence bearing upon these facts. Obviously petitioner's statement as to such very material facts is incomplete; and incompleteness, in such a matter, is the equivalent of inaccuracy.

The facts of record concerning the acquisition by Simkins of knowledge, and the disclosure of that knowledge to the court and to Crites, Inc., are as follows:

(a) At the time of Jones' first visit to Simkins, Simkins learned from him that Jones was acting as agent

for "Cincinnati parties" on whose behalf he was desirous of purchasing the 11 farms as a unit. He did not learn the name of Jones' principal nor how much the principal was willing to pay for the farms as a unit (R., 123, 146, 150, 206, 209, 281-282).

This information, being all that Simkins then knew as to Jones' objective, was communicated to Mr. Harlor of counsel for the petitioner and to District Judge Hough (R., 123, 146). Simkins does not say that he told counsel or the court that he had accepted employment from Jones; though he says that this fact "was no secret"; and that, "I may have told Judge Hough. I would not have hesitated in telling him." (R., 157.) Judge Hough's death made it impossible to clear up this question, if it be material.

(b) On or shortly prior to June 27 and approximately one week before the day set for the sales Simkins learned the price which was to be offered to Prudential (\$249,106) and possibly the name or identity of Jones' principal (R., 123, 147, 148, 150, 275, 282, 283). He did not communicate this additional knowledge to the district judge or to counsel for Crites, Inc., prior to the sale. However, he was present in court (R., 286) when Mr. Harrison, one of the attorneys of record for the receivers and also attorney of record for Prudential as petitioner in the foreclosure proceedings and purchaser at the sale, advised Judge Hough of the offer and its later acceptance and of the price (R., 265). The occasion was the hearing on the motions for confirmation of the sales, of which counsel for Crites, Inc., had four days' notice (R., 28).

Whether or not counsel for the petitioner attended this hearing and heard Harrison's oral statement to the court is not disclosed; although Mr. Haffenberg, of counsel for the petitioner, read into the record at pages 227 and 228 a passage from Harrison's affidavit, hereinafter described, which would indicate that objections to the motion to "were suggested by reason of alleged commitments made by the plaintiff for the sale of certain of said properties, prior to public sale" from which it might be inferred that the present petitioners' counsel were then present and suggested such objections.

In any event, and despite Judge Hough's intervening death, there can be no doubt that Harrison did advise the judge, in open court, of Jones' offer; for at the suggestion of Judge Hough (R., 265) Harrison prepared and transmitted to the clerk (Exhibit A, admitted and printed at R., 266) with copy to the district judge (Exhibit B, R., 267, admitted 266) an affidavit to which was attached a complete copy of Jones' written offer dated June 27 and accepted at Newark, New Jersey, on July 3. This affidavit of Harrison was filed in the cause (R., 148) and was marked as Exhibit No. 4 in the hearing on the receivers' accounts, for the purpose of identification (R., 165); it was practically read into the record by Mr. Haffenberg of counsel for the petitioner (R., 227, 228) and was much discussed in colloquy during the hearing (R., 154). Apparently by inadvertence it was not offered or received as a part of the evidence in the hearing on the exceptions; but its purport is clear from the record; and a copy of the written offer, attached to the affidavit,

was attached to the exceptions to the accounts, filed July 24, 1937 (R., 50, 61). So there is documentary evidence supporting the statements of Harrison and Simkins; and it is clear that the District Court, before confirmation, was apprised at least of the identity of Jones; of the amount of his offer; of the fact that this amount was intended to include the landlord's interest in the growing crops; and of the fact that the offer was submitted prior to the sales. Nevertheless the sales were confirmed (R., 30).

Petitioner's brief is remarkable for its utter failure to allude to what transpired at confirmation. Its discussion is based upon the premise that the only revelation to the petitioner and the district judge was the earlier report of Simkins described in the preceding paragraph hereof.

In summary, it may be said that the only facts concerning the Jones transactions which may not have been seasonably communicated to counsel for Crites, Inc., or in open court when counsel were on notice, were Simkins' employment by Jones and the identity of Proctor. There is argument in petitioner's brief upon the implication that Simkins or Prudential or both knew, before confirmation, that Proctor was willing to pay \$281,000 or some other sum greatly in excess of \$249,000 for the farms; but there is no proof whatever to sustain this assumption.

Finally the respondent conceives that other material facts are disclosed by the record upon which no comment whatsoever is to be found in petitioner's brief, viz.:

11. District Judge Hough had exercised considerable supervision over the foreclosure proceedings. He had held up the decree and the sales for a year, hoping for

better times (R., 128). The receivers had gone to him for informal advice and directions with respect to the management of the farms; and Judge Hough had repeatedly suggested to them that they seek the advice of the agents of Prudential (R., 284); after the sale of the land on July 1 he advised the receivers as to the disposition by them of the wheat crops which had been harvested before the sale (R., 283, 284) and of the growing corn crop (R., 136).

As soon as the wheat crops were sold, which was April 14, 1934 (R., 39) the receivers made up separate accounts for each of the 22 farms involved in the receivership. They brought these accounts with supporting vouchers to the office of the district judge in Columbus and delivered the original accounts and the vouchers to Judge Hough (R., 68, 156, 198-199):

Judge Hough did not permit these accounts to be filed; instead he called Mr. Harrison, apparently in the latter's capacity as attorney for the Prudential, by telephone and asked him to come to the Judge's office in Columbus for a conference with the receivers and the court (R., 229). On May 7, 1934, this conference was held in Judge Hough's chambers. Judge Hough asked Mr. Harrison to take copies of the reports or accounts and have them audited, as "your client is chiefly interested here." He expressed the opinion that "if there is anything that is wrong it will be much simpler to have objections known in advance and get together with the receivers and work them out, rather than to set them down for exceptions." (R., 230).

At this time, of course, Judge Hough was fully apprised of the resale by Prudential to Mary E. Johnston.

Harrison took carbon copies and sent them to the home office of the Prudential for auditing; the auditors raised questions as to the expenses charged by the receivers; and these criticisms led to correspondence in an effort to compose the differences (R., 231). This delay continued until Judge Hough's untimely death. The master and the District Court properly took judicial notice that this event occurred in November, 1935; and that Judge Underwood, Judge Hough's successor, was not inducted until April 11, 1936 (R., 69). Further delays occurred and repeated efforts were made by the receivers and by Mr. Ingalls as their counsel to locate the original accounts and vouchers or to secure the copies from the Prudential; so that it was not until February, 1937, that new accounts were filed by the receivers (R., 69).

Informal notice of the filing of these accounts having been given to counsel for Crites, Inc. (R., 107) they attended the hearing set for June 2, 1937, on the accounts and then commenced a general and rather unsystematic inquiry which led to a reference to the master, several continuances of the hearing and to the filing of objections and exceptions in mid-hearing, as it were, on July 24, 1937 (R., 50). Many references to the somewhat confused record might be made to show the extent to which the recollections of all the witnesses had failed in the interval of time between the happening of the events inquired into and the dates of the hearings. Many of the issues of fact raised by the faulty recollection of wit-

nesses and suggested by the exceptions of the petitioner could have been resolved, had Crites, Inc., pursued its remedies during the two years after the sales, while Judge Hough was still living.

12. Not only was Crites, Inc., through its counsel, informed of the possibility of a sale of the Madison county farms as a unit to a prospective purchaser; not only was it chargeable with knowledge that such a sale had been made, at the time of confirmation on July 18, 1933; not only was the record of the deed from the Prudential to Mary E. Johnston available to petitioner after its recordation on August 21, 1933 (R., 312; exhibit admitted at same page); but the record shows that the petitioner actually did learn of the sale soon after it took place. At page 155 of the record Mr. Haffenberg, counsel for petitioner, makes the following statement:

"I will take oath on this statement, that even Mr. Harrison advised us when we were trying to inquire about that farm that the purchaser was obtained after the Marshall's sale, and this all developed at a picnic. In other words we were put to sleep on the reliance of his statement, and it was not until some two years after that we developed any of the facts in connection with this matter."

This statement suggests inquiry by Crites, Inc., into the circumstances of the sale at a time when in all probability Judge Hough was still living, and when Mr. Harrison's affidavit and the attached exhibit were on file with the papers of the foreclosure action in the office of the clerk of the District Court.

Moreover Crites, Inc., knew from the beginning that Simkins was cognizant of the effort to purchase the lands

as a unit for he reported it to Mr. Harlor. At some undisclosed time prior to the filing of the receivers' reports petitioner's counsel learned definitely that Simkins had been compensated for assisting Jones (R., 123, 150, 151, 209). This information was elicited in the course of the trial of another action in the courts of Pickaway county, Ohio. For aught that appears Crites, Inc., then had full knowledge of all the essential facts on which the petitioner's claims are here predicated, long before it instituted the proceedings which have come here, and perhaps during the lifetime of Judge Hough. The attitude and inaction of the petitioner is very frankly stated in the record by Mr. Haffenberg in his opening statement at pages 106-107:

"If the court please, this report brings up a situation that I think has been held in abeyance three and one-half years . . .

"The foreclosure actions were instituted in February, 1932, the sale confirmed on July 18, 1933. **From that time until this we have been waiting** for the filing of these reports and the application for confirmation."

Bearing in mind that Crites, Inc., did not file any answer in the foreclosure cases setting up the nature of its claimed interest; that it acquiesced in the receiverships not only by yielding possession but also by permitting the receivers' tenants to use machinery which it claimed as its own property (R., 17); and that it then took no further interest in the proceedings, until the filing of the action of the receivers. The remark of the master at page 70 of the record is pertinent:

"The record clearly shows that Crites, Inc., had not been aggressive in the proceedings and that Judge Hough had considered the matter one between the receivers and the Prudential. Since the exceptors took no steps to compel an accounting or to assert their interest; it cannot be presumed that if an account had been made at an early date they might have found something upon which they might have acted to their own advantage. Where is the assertion of their interest in these cases, either in the form of answers or otherwise, prior to the filing of these exceptions? It is apparent that the exceptors took no open or active interest in these cases until after the filing of said accounts of February 19, 1937."

13. Petitioner claims that Simkins should be held accountable for "(c) the amount received by Prudential in excess of the decree indebtedness (or in the alternative) the amount by which the appraised value of the Madison county farms exceeded the indebtedness * * *" (petitioner's brief, p. 35). In summary argument (p. 13) petitioner states as a fact that "Prudential made a profit of \$25,363.78 above the aggregate decree indebtedness" (petitioner's brief, p. 13). The alternative claim is not made specific in the brief; but in petitioner's exceptions (R. 345) it is stated that the appraised values of five of the Madison county farms exceeded the decreed debts and taxes in respect of those five farms by \$14,311.72.

The figure \$25,363.78 is inaccurate. Respondents suggest that it is impossible from the record to ascertain whether Prudential made any profit on the resale of the land to Proctor or Mary E. Johnston, much less the exact amount of any such supposed profit. The amount re-

ceived (\$249,106) included the half interests in the corn crops growing on the Madison county farms, separately appraised and sold to Prudential by the receivers under orders of the court for an aggregate amount of \$7,768.70 (R., 19) which amount was charged against Prudential's advancements to the receivers to pay taxes and insurance. Also to be charged against the gross difference between the decree indebtedness as at May 2, 1933, and the selling price would be the costs in the separate foreclosure actions, the marshal's cost at the sales and interest at the contract rate to the date of the sale if not to the date of the resale; also expenses of the resale including cost of title policies. Some of the figures are shown in the exhibit at R., 335, and explained by Harrison in the affidavit, R., 327 (received R., 310) supplementing and correcting his earlier testimony at R., 243-244. Harrison's computation shows a profit based on the judgments of \$1,843.23. It is obvious, however, that the question of Prudential's profits must remain open until final accounting between the receivers and Prudential which has not yet been made.

The Agreement as to Fees.

Respondents find no fault with petitioner's statement of facts as to this matter at pages 9 and 10 of petitioner's brief.

SUMMARY OF ARGUMENT.

I.

Simkins Is Not Accountable as Receiver for the Compensation Which He Received as Jones' Attorney, Nor for Prudential's Profits on Resale, if Any, Nor for the Difference, if Any, Between the Decree Indebtedness and the Appraised Value of Some of the Farms, Nor for Jones' Profits or Commissions.

A. The principle that a fiduciary will not be permitted to retain a profit from any transaction with respect to which he is under a fiduciary duty does not apply because Simkins as receiver was under no fiduciary duty with respect to the foreclosure sales. The authorities listed at page 12 of petitioner's brief exemplify the rule which applies when such a fiduciary duty exists. The following authorities show that where such a duty does not exist the rule does not apply:

Twin Lick Oil Co. v. Marbury, 91 U. S., 587;
Allen v. Gillette, 127 U. S., 589;
Pewabic Mining Co. v. Mason, 145 U. S., 329;
Starkweather v. Jenner, 216 U. S., 524;
Turner v. Kirkwood, 49 Fed. (2d), 590;
Anderson v. Messinger (6 Cir.), 146 Fed., 929;
Reeves v. Crum, 97 Okla., 293, 225 P., 177;
Mercantile Trust Company v. Sunset Road Oil Co.
 (Calif.), 195 P., 466;
DeJarnett v. Peake (Calif.), 56 P., 467;
Beckman v. Emery-Thompson Machinery & Supply Co., 9 O. A., 275;
Steinbeck v. Bon Homme Mining Co., 152 Fed., 333.

B. Simkins as one receiver of rents and profits, appointed in a foreclosure proceeding conducted under the laws and customs of Ohio, had no control over the sales ordered by the court and held by the marshal and no duty to perform in connection therewith.

C. Neither in his capacity as receiver nor in any other capacity did Simkins influence the course of the foreclosure sales by preventing any bids or in any other way. Jones' offer to Prudential, pending at the time of the sales, did not prevent Jones from bidding on behalf of his principal at the sales nor from dealing with Crites, Inc., because Jones would not have pursued either course, under his instructions from his principal.

D. Simkins did not participate in any profits which Prudential may have made nor in Jones' profits, as such. He was paid compensation for his services in acting as Jones' attorney.

E. While Simkins, as receiver, was under no duty to transmit information acquired by him of facts which might influence the conduct of Crites, Inc., to the District Court for the benefit of all parties such information was actually so transmitted.

II.

Simkins Should Not Be Held Accountable Because of the Sales of the Receivers' Interest in the Growing Corn Crops.

A. The sales of the growing crops to Prudential by the receivers were ordered by the court with full knowledge of all material facts. Under such circumstances the principle against conflicting interests does not apply.

III.

Simkins Should Not Be Penalized in Respect of His Compensation as Receiver, by Reason of the Fee Pooling Understanding Between Ingalls and Himself.

A. The evidence shows that, after the lapse of three years, during which no question had been raised, Simkins and Ingalls had not divided any fees allowed by the court to either of them.

IV.

The Petitioner, Grites, Inc., Is Barred From Relief in Equity Through Exceptions to the Creditors' Accounts, by Its Own Laches.

A. Grites, Inc., admittedly delayed the pursuit of any remedy for its alleged wrongs until the belated filing of the substituted receivers' accounts. It acquired actual or constructive notice of all the essential acts at some undisclosed prior time. Judge Hough's intervening death and the failing recollection of witnesses manifestly disadvantaged the respondents at the hearing.

Hammond v. Hopkins, 143 U. S., 224;
Missouri & K. I. Railroad Company v. Edson, 224
Fed., 79.

ARGUMENT.

I.

Sinkins' Fiduciary Obligations Did Not Prevent His Acceptance of Employment as Jones' Attorney.

The foreclosure proceedings here involved were conducted under and conformably to the laws and customs prevailing in the state of Ohio. The courts of that state adhere to what is sometimes called a modified common law title theory of a mortgage. **Kerr v. Lydecker**, 51 O. S., 240, and earlier decisions therein cited.

Foreclosures are, however, strictly regulated by statute in Ohio. Section 11588 of the General Code of Ohio, as in force at the times herein material, provided:

"When a mortgage is foreclosed or a specific lien enforced, a sale of the property shall be ordered."

Other sections provide for the appointment of appraisers, among them Sections 11711, Ohio General Code, which governs the terms of sale and need not be herein quoted. While it has been held by the Sixth Circuit Court of Appeals that the Ohio statutes do not preclude a sale without appraisal under a power of sale contained in the mortgage or deed of trust (**Etna Coal and Iron Co. v. Marting Iron and Steel Co.**, 127 Fed., 32), yet this practice is rare in Ohio; and the mortgages herein involved contained no power of sale.

In these cases the appointment of appraisers was prayed for in the third cause of action in each petition

for foreclosure (R., 5) on the following grounds, which we abstract:

That the real estate was not being occupied by the mortgage debtors but was leased or tenanted to and by others;

That the mortgage debtors were in default and that the real estate was probably of a value inadequate to secure the debt;

That a petition in involuntary bankruptcy had been filed against one of the mortgage debtors and that the mortgage debtors had conveyed and assigned all of their property, real and personal, to Crites, Inc., and were insolvent or in immediate danger of insolvency.

That the appointment of a receiver forthwith

"to take charge of the above described mortgaged premises, to rent and manage the same, collect the proceeds thereof and apply the same to taxes, assessments and otherwise, as this honorable court may direct pending judgment and sale",

was necessary in order to avoid irreparable injury to the petitioner in that the tenant years in the vicinity of the real estate began on March 1.

Pursuant to this prayer an order was entered appointing Simkins and Florence as co-receivers

"to collect the rents and proceeds of the real estate described in the second cause of action in plaintiff's petition herein and/or to operate and manage said real estate through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the court." (R. 10.)

The same order fixed the bond of the co-receivers in 22 co-related cases at only \$10,000 which further indicates the restricted scope of the receivers' duties and responsibilities. Respondents submit that it is obvious that the master, District Court and the Circuit Court of Appeals were entirely right in holding as did the Circuit Court of Appeals that the receivers "had no authority to dispose of the real estate; had nothing to do with bringing about the sale and no control over the manner in which it was carried on. They were not in any sense liquidating receivers."

The best the petitioner can do with this quite decisive holding of the lower courts is to say at page 16 of its brief,

"We find no such exact divisibility of purpose in the orders of the District Court, but rather a single purpose to administer and liquidate the trust property in the manner most beneficial to all parties concerned."

In an attempt to support this erroneous analysis petitioner argues that the District Court consulted with one of the receivers as to deferring the sales; but it is admitted by the petitioner (petitioner's brief, p. 17) that there is no evidence to show that the receivers in any wise influenced the court's final decision in the matter.

The only transactions committed to the receivers herein were the leasing of the farms to tenants, the care of the buildings, etc., thereon, the securing and furnishing of seed for planting, the collection of the "rents"—payable in kind as shares of harvested crops—the maintenance of insurance on buildings, the payment of taxes and other

expenses incident to the nature of their control over the farms, and the keeping of proper accounts and records. In all **these** transactions, their fiduciary obligations extended primarily to the plaintiff, the Prudential, on whose behalf they had been vested with control, and indirectly to Crites, Inc. But the transactions involved in the foreclosure sales were completely outside the scope of their powers, either legal or factual, and of their responsibilities. The conclusions of the master and the Circuit Court of Appeals, as to the nature of the receivers' fiduciary obligations are, we submit, entirely correct.

The petitioners seek the benefit of the rule that a fiduciary will not be permitted to profit by dealing with the trust property.

There is indeed a salutary and well-established principle of equity to the effect that a fiduciary will not be permitted to profit by any **transaction** with respect to which he is under a fiduciary duty. The principle is absolute, applying whether or not there be fraud or concealment, and regardless of the fairness of the transaction. It admits of but one exception, viz., that a fiduciary who is an officer of the court may be authorized by the court to do what would otherwise be prohibited to him.

It is this principle which condemns a purchase by a fiduciary at a sale made by himself; but the principle, as applied to judicial and similar sales, is not limited narrowly to such a case, nor did the Circuit Court of Appeals suppose it to be so narrowly limited, as erroneously argued by the petitioner at page 16 of its brief. It extends its condemnation to all cases in which the fiduciary is charged with any responsibility or duty in bringing

about or influencing the course of the sale, even though the reception and acceptance of bids be conducted by another fiduciary or officer of court.

Many of the cases relied upon by the petitioner were decided upon this principle.

In **Jackson v. Smith**, 254 U. S., 586, Ambrose was liquidating receiver of a building association. One of the assets which it was his duty to collect was a note secured by a mortgage of real estate, with power of sale vested in a trustee. (As pointed out in opinion in **Reeves v. Crum**, 97 Okla., 293, Ambrose as receiver for the creditor secured by the mortgage, and under the practice prevailing in the District of Columbia with respect to sales under powers of sale, had the power to order the trustee to advertise and sell the property; the power to designate the time, place and conditions of sale; and to order a deed.) Ambrose, as receiver, requested the trustee to sell, and ultimately, with others, bought in the property for an amount insufficient to pay taxes and costs (in consequence of which Ambrose, as receiver, realized nothing) and soon after sold it at a profit. Mr. Justice Brandeis said (p. 588):

"Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. **Baker v. Schofield**, 243 U. S., 114; **Robertson v. Chapman**, 152 U. S., 673, 681. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. **J. H. Lane & Co. v. Maple Cotton Mill**, 232 Fed. Rep., 421."

Ambrose was surcharged because as receiver he had brought about the sale for the purpose of realizing upon

the note, and it was his duty to influence and control the sale.

In **Nugent v. Nugent** (1907), 2 Ch., 292 (affirmed (1908), 1 Ch. 546) one of four part-owners of a house was defendant in a partition suit, in which a sale was prayed. She was appointed receiver of the rents and profits. A mortgagee intervened and took an order authorizing the mortgagee to sell under her power of sale, by public auction. The defendant-receiver bought the house at the sale. The court would not permit her to retain it.

Swinfen-Eady, J., sitting in the chancery division, stated the reason for the decision as follows:

"A receiver appointed by the court cannot purchase property of which he is receiver without the sanction of the court. That question has arisen directly in Ireland in *Alven v. Bond* (1 Fl. & K., 196, 213).

"Sir Michael O'Loughlen, M. R., said, * * * I think that it would be very dangerous to allow a person, who has so much control over the property, as a receiver of the court must necessarily have, such opportunities of acquiring a knowledge of the circumstances and value of it, which may not be easily attained by others, **who may be, as in the present case, employed in the preparation of the rental to be used at the sale (which everyone knows to be one of the most important documents used on such an occasion)** to become the purchaser of the estate without the sanction or knowledge of the court * * *. Very great powers are given to, and much confidence placed in this officer, who is placed in a situation which would enable him, if inclined to act dishonestly, **by reducing the rental or lettings made by the court, or otherwise, to bring to a sale under very dis-**

advantageous terms, the property confided to his care, and thus become the purchaser at an under-value * * *

"The language of Sir Michael O'Loughlen, M. R., is of general application. It is based upon general principles, and applies equally to a case where the sale is not under a decree in the action, but is a sale by a mortgagee under a power of sale * * *"
(Emphasis ours.)

So the reason for the rule in Ireland and England, that a receiver may not purchase at the mortgagee's sale under power, is that such sales, in those countries, are conducted without appraisement, though sometimes at public auction; and people there bid on rental income, where available, not on supposed selling value, as here; and the receiver owes a duty to furnish information to bidders at the sale. In Ohio, all foreclosure sales are upon official appraisement, and a receiver has no such duty or responsibility. Moreover, in **Nugent v. Nugent**, the receiver would have been under a duty to sell, had it not been for the interposition of the mortgagee.

In re Sheets Lumber Co. (La.), 27 Southern 809, liquidating receivers of the lumber company petitioned the court for an order to sell certain assets at public sale (other assets had already been sold by the receivers at private sale). The court ordered a sale by the sheriff.

One of the receivers bought certain real estate offered at this public sale. The court (Monroe, J.), said:

"He ought to have known that he could not buy that, or any other property belonging to the corporation, for which it was his duty to obtain the best price possible."

In that case the sheriff's sale was but one means of discharging the receivers' general duty to liquidate all the assets at the best price possible.

In **Baker v. Schofield**, 243 U. S., 114, cited by petitioner, a liquidating bank receiver sold to another a certain asset standing in his name as receiver. In an action by a successor receiver to impress a trust on the assets, both lower courts had found, on the evidence, that the first receiver's sale was colorable, and that the first assignee had purchased upon a secret trust for the receiver. This is a plain case for the application of the principle in its simplest form. The receiver both sold and bought. Attention is called to the controlling weight given by this court to the concurrent conclusions of fact of the District Court and the Circuit Court of Appeals (see 243 U. S. at p. 118). In the case at bar, the concurrent holdings of the two lower tribunals are determinative of many of the issues of fact, as will be hereinafter noted.

In **Donohue v. Quackenbush**, 62 Minn., 132, 75 Minn., 43, a receiver of land encumbered by the lien of a judgment against the defendant in the action, purchased the judgment, foreclosed its lien by agreement with defendant's wife, bought in the land at the execution sale, and resold it to another at a profit. He thus acquired an adverse interest in the land and profited by it. His assignee was compelled to account by the defendant in the action. The case, while quite dissimilar to the case at bar, is well within the general principle.

Cook v. Martin, 75 Ark., 40, does extend the principle beyond its true boundaries, and supports the petitioner's

contention. Apparently, it stands alone and is opposed by the weight of the decisions which we shall hereinafter cite. It may be worthy of note to observe however, that, on rehearing, the judgment was reversed on the principle of election of inconsistent remedies.

Shadewald v. White, 74 Minn., 208, the last of the cases cited by petitioner at page 12 of its brief, was decided on another principle; for in that case the whole foreclosure proceeding, including the appointment of the receiver, the management of the business and property and the ultimate sale, was in pursuance of a collusive agreement between the receiver and the principal stockholder of the mortgagor, and an actual fraud upon creditors and court alike.

In all of the foregoing cases which apply the principle as we have stated it (excepting **Cook v. Martin**, supra), the receiver or his assignee was held accountable because, as receiver, he was under some specific duty or responsibility to act, or participate in, or had some power to direct and control, the transaction out of which his profit was derived.

On the other hand, one who sustains a fiduciary relation to another is at liberty to undertake and profit from a transaction in which his interests are adverse to that other, when the fiduciary relation does not encompass the transaction. If this were not so, the consequences would be far-reaching indeed. From the numerous decisions which reflect this converse side of the principle respondents have selected a few which resemble the case at bar.

In this court the doctrine goes back at least as far as **Twin Lick Oil Co. v. Marbury**, 91 U. S., 587. In that case a director of a corporation lent money to it secured by a deed of trust conveying all of its assets to a trustee "with the usual power of sale in default of payment."

While still a director, he caused the property to be sold under the deed and bought it in at the sale through an agent. Later the corporation filed a bill to impress a trust upon the corporate property in the hands of the director and for an accounting. The bill charged concealment of special knowledge concerning the value of the property and premises from individual shareholders and that the defendant had declared that he would purchase the property for the joint benefit of all. These averments were denied; and the court found on the evidence that there was no actual fraud or oppression.

Referring to the fiduciary obligations of the director, Mr. Justice Miller said:

"That a director of a joint/stock corporation occupies one of those fiduciary relations where his dealing with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others * * *. The general doctrine, however, in regard to contracts of this class is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it" (pp. 588-589).

The learned justice then held that the original loan, having been entered into fairly, was a valid contract, and continued as follows:

"If it be conceded that the contract . . . was valid, we see no principle on which the subsequent purchase under deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted."

Allen v. Gillette, 127 U. S., 589, was heard, according to the old equity practice, upon bill and answer, answer having been given under oath. The bill had charged fraud and concealment in fact, which the court held had been repelled by the answer. The defendant was one of three co-executors under a will authorizing them to administer the entire estate of the decedent including the real estate. The complaint was one of the devisees; she had mortgaged her interest in some of the lands of the estate. This mortgage had been foreclosed and that interest had been sold at judicial sale and purchased by the defendant. The object of the bill was to hold the defendant accountable as a trustee and permit the complainant to redeem. Mr. Justice Lamar said at pages 593-594:

"It must be conceded that, as a general rule of equity jurisprudence, a trustee or person acting in a fiduciary character for the benefit of others cannot become a purchaser at his own sale, or acquire any interest therein without the express consent, or under a special permission given by a court of competent jurisdiction. The cases cited by counsel for appellant abundantly support this doctrine. It ap-

plies to executors and administrators who are not permitted to derive a personal benefit from the manner in which they transact the business or manage the assets of the estates intrusted to them; but whatever advantage is derived by them from a purchase at an undervalue is for the common benefit of the estate."

and again at pages 595 and 596:

"* * * the defendant occupies no relation of trust or confidence to the transaction. With no legal power over any of the contracting parties, with no right to interfere with the trustee, to whom full power by the deed is lawfully given to sell the incumbered interest at public auction, he has no trusteeship in regard to it, no duty to perform in respect to it. The debt itself, incurred by complainant, constitutes no part of the liabilities of the estate which he, as executor, represents. The sale, when made, touched that estate nowhere, did not diminish its assets in the least, nor withdrawn from it any lands, subject to the debts of creditors, and to the ultimate partition of the devisees and their assigns.

"There is nothing in the transaction, from its inception to its final consummation, that imposed upon the defendant any duty incompatible with his right as a purchaser at the sale.

"The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of this court and of other courts of this country. **Prevost v. Gratz**, 1 Pet. C. C., 364, 378; **Twin Lick Oil Co. v. Marbury**, 91 U. S., 587; **Chorpening's Appeal**, 32 Penn. St., 315; **Fisk v. Sarber**, 6 W. & S., 18.

"It is true that the rule upon this subject as stated by some text writers is more stringent than that stated in these cases. 1 Perry on Trusts, Section

205; Hill on Trustees, 250. We think, however, that the language employed by them does not present a thorough and perfect generalization of the essential principles pervading the decisions upon this subject.

Pewabic Mining Co. v. Mason, 145 U. S., 349, was an appeal from a confirmation of a sale ordered by a Circuit Court in proceedings for the liquidation of the assets of a mining corporation. The bill for dissolution had been filed by certain stockholders of the company to forestall a threatened sale of all of its assets to another company, approved by the majority of the shareholders. The sale was conducted by the master and certain of the complainants in the cause bid in the property. It was alleged that before so bidding these stockholders, who had brought about the sale, had devised with another company "a scheme to take the property (if bought) off their hands at a very large personal profit; and they did not disclose this fact to the court" nor to their fellow stockholders or other bidders at the sale (p. 352). So it was charged that the complainants were both buyers and sellers.

This court sustained the confirmation of the sale. Mr. Justice Brewer said, among other things:

"The English practice does not obtain in this country. A sale made by a special master under the directions of a court of chancery is not a sale made by either of the parties to a litigation or under his direction. The master is a representative of the court, as a marshal or sheriff is in an action at law. He is not under the control of either party; he is not the agent of either to make the sale. At such public judicial sale, either party as a rule may bid. Rich-

ards v. Holmes, 18 How., 143; **Smith v. Black**, 115 U. S., 308; **Allen v. Gillette**, 127 U. S., 589; **Smith v. Arnold**, 5 Mason, 414, 420. In that case Judge Story said: 'In sales directed by the court of chancery, the whole business is transacted by a public officer, under the guidance and superintendence of the court itself. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed.' (p. 361.)

In **Starkweath v. Jenner**, 216 U. S., 524, the complainant, the owner of unimproved land in Washington, D. C., formed a syndicate pursuant to which he conveyed the land to trustees with power of sale, in trust for contributors to a common development fund. The land was incumbered by mortgages. One of the mortgage debts matured and the mortgagee directed a sale by the trustee, pursuant to the method of foreclosure in vogue in the district. It was purchased by one of the members of the syndicate. Plaintiff sought to charge the purchaser as a trustee and alleged fraudulent collusion. This court found that there was no fraud and affirmed the Court of Appeals of the District of Columbia which had dismissed the bill. Mr. Justice Lurton said:

"But it is plain that the principle which turns a co-tenant into a trustee who buys for himself a hostile outstanding title, can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public.

"Even a trustee has been held competent to purchase the trust property at a judicial sale, which he has no interest in, nor any part in bringing about,

and which sale he in no way controls. **Twin Lick Oil Company v. Marbury**, 91 U. S., 587; **Allen v. Gillette**, 127 U. S., 589.

“But it is said that if there is no absolute prohibition upon one co-owner buying at an open sale of the common property to satisfy a mortgage or other incumbrance thereon, that at least the fiduciary character and common interest due to such a cotenancy require of one who buys the utmost fairness of conduct. Concede this. It is then said, that Jenner at the bidding held a power of attorney from three others of the syndicate members, by which he was to bid the property in for their mutual benefit at the lowest price possible, and at a price not exceeding \$25,000. That he held this power of attorney and had undertaken to buy at as low a price as possible was not known to appellant and that this ‘secret combination’ as it is styled and designated, was a fraud upon him. * * *

* * * That sale was in February, 1898. This bill was filed in the spring of 1903. That appellant did not at the sale know that Jenner was buying for himself and certain other of the syndicate may be true, but he, confessedly, learned that fact when Jenner and his associates fell out and the fact came to light in a bill filed in December, 1898. At most, the sale was voidable, not void, and he who would complain must seasonably elect whether he will avoid it or not. **Twin Lick Oil Co. v. Marbury**, 91 U. S., 587.

“Appellant did not act with that degree of promptness which equity demands. He has slumbered over the question of whether he should elect to let Jenner hold on to his purchase or require him to give the benefit of his bargain to his co-tenants. A delay of not less than four years, during which there has been a large appreciation in the value of the property, is unreasonable. Two courts in succession have failed to find ground for relief, and we see no good reason

for reversing the decree from which the appellant has appealed." (pp. 528, 529, 530-531.)

In addition to the decision of the Circuit Court of Appeals, in this case, there are several others such as **Turner v. Kirkwood**, C. C. A. 10, 49 Fed. (2d), 590, fully discussed in petitioner's brief at pages 26 to 30, inclusive; **Anderson v. Messinger**, C. C. A. 6, 146 Fed., 939; and **Steinbeck v. Bon Homme Mining Company**, 152 Fed., 333. As to **Turner v. Kirkwood**, we agree with the counsel for petitioner in the statement that this and the other cases leave for determination the question as to whether, in relation to a judicial sale conducted by another, a receiver or like fiduciary who does not actually conduct the sale "has placed himself in a position where his personal interest is in conflict with his duty as a fiduciary."

On page 594 of the report of that case the court said:

"The test is not whether the correlate has suffered an injury but whether there has been a clash between the personal interests and the duties of a receiver."

To which statement we presume to add this:

"The test is not whether the receiver owes some duties to the "correlate" but whether he owes duties with respect to the particular transaction in which he is alleged to have acquired a personal interest."

Of the state cases, the most striking is **Reeves v. Crum**, 97 Okla., 293. In that case the trustee in bankruptcy of the mortgagor, representing other creditors of the mortgagor, just as Crites, Inc., purports to represent other creditors of the mortgagors in the case at bar, brought an action against the foreclosure receiver, the plaintiff,

an agent of the plaintiff, and others. The complaint charged that the receiver, together with the plaintiff and the plaintiff's agent, entered into an agreement with the third party defendants whereby in consideration of the payment of \$3,000.00 the third party defendants would refrain from bidding at the foreclosure sale. A demurrer for insufficiency of facts was sustained.

It was urged in that case, as it is urged here, that the case of **Jackson v. Smith** was controlling. The Oklahoma court denied the applicability of **Jackson v. Smith**, and referring to Ambrose, the receiver, in **Jackson v. Smith**, said:

"He occupied a position of confidence and trust toward the defunct association and its stockholders as thrust upon him a legal as well as a moral duty to obtain the best possible price for the property and to return the same to the treasury of the association for the benefit of the stockholders. The fiduciary relation of Ambrose the receiver to the association is clearly apparent, he having absolute power over the property of the association."

The court having denied that there was any similarity, in dealing with the sufficiency of the complaint before it, used this language:

"Browder and his co-defendants occupied no such position toward the creditors of the bankrupt estate; his duty only being to collect rents and make an accounting to the court for the benefit of the Oklahoma Farm Mortgage Company. He possessed no power to direct the time, place or conditions of the sale, or to direct a deed to issue. The adequacy or inadequacy of the price obtained did not concern him in position as receiver for rents; he might have purchased the property and held it in his own name,

or acquired an interest therein by a partnership agreement with others and reaped whatever profits might arise from the transaction, without betraying any confidence or trust, as no confidence or trust was ever reposed in him by the trustee in bankruptcy."

In **DeJarnett v. Peake, Calif.**, 56 Pac., 467, a foreclosure receiver brought an action against the third party to recover a commission which the third party had agreed to pay the foreclosure receiver for acting as his agent in procuring an assignment of the note and mortgage in order that the third party might in that manner obtain the property. The court examined the evidence, found that there was no unfair dealing, held that there was no inconsistency in the receiver's position, and that he could recover the commission.

Other illustrative state cases are:

Mercantile Trust Company v. Sunset Road Oil Company, Calif., 195 Pac., 466;

Beckman v. Emery-Thompson Machinery & Supply Co., 9 Ohio App., 275.

Thus the authorities show that a transaction of the kind involved in the case at bar will be held voidable *per se* only if the receiver had control over the sale conducted by another officer or some duty to perform in connection therewith. It is true that such a transaction invites careful examination by the court, if questioned; and the record in this case shows that such examination was given by the master, the District Court, and the Circuit Court of Appeals. The record shows concurrent conclusions of fact favorable to the receiver Simkins. The triers of the facts have found that Simkins had

nothing whatever to do with the foreclosure sale as such; neither actively nor passively, according to these findings, did he influence their course. His connection was, not with the foreclosure sale, but with the resale by the successful bidder, Prudential to Jones, and through him to his principal. The other question suggested in argument by the petitioner is as to whether or not the negotiations leading up to that resale, which were commenced prior to the foreclosure sale, had the effect of preventing the ultimate purchaser from bidding at the foreclosure sale. The lower tribunals have found positively that it had not and could not have had such effect, as Col. Proctor was never a prospective bidder at the marshal's sale. This conclusion of fact is amply sustained in the record.

It is also argued by the petitioner that Simkins was a joint venturer with Jones, Prudential, Proctor, etc., and is to be held liable for the profits, if any, of all of these others under the rule of **Jackson v. Smith, supra**. That that decision in general is inapplicable here has already been argued; but the case at bar differs from **Jackson v. Smith** and from many of the other cases hereinbefore discussed in another respect, namely, in that Simkins, as found by the lower courts, served Jones as an attorney and was in no other sense a participant in whatever profits he may have made in connection with the resale. Furthermore, the record is clear and the lower tribunals have found that Simkins, in the questioned transaction, was in no sense serving Prudential. We have argued that Simkins should not be required to account for the fees which he received from Jones; but in any event, to require him to account for what

Jones may have received and for the hypothetical profit which may have accrued to Prudential on the resale, is, on the facts found below, extravagant and wholly unwarranted by **Jackson v. Smith** or any other authority.

Petitioner seems to argue that Simkins was wanting in candor and fair dealing in that he did not fully disclose what he knew concerning the proposed resale to the District Court or to the petitioner; and the suggestion, but buttressed by any citations of authorities on the point, is that Simkins should be required to account on this footing even though, as we have argued, the rule which would subject a fiduciary to accountability, regardless of the fairness of the questioned transaction, does not apply.

In dealing with this question, if it is to be considered at all, it must be remembered that Crites, Inc., is the complaining party. It appears to be a corporation composed of some of Crites's principal unsecured creditors, to which Crites and his wife, the debtors, had conveyed all of their assets, including the equities of redemption in the several farms involved in the foreclosure proceedings. Being in possession in the sense of receiving the rentals and profits of the lands, it was made a party to each of the foreclosure proceedings; for a time it participated and cooperated in the action by lending machinery belonging to it to the farm tenants. Then seemingly it lost interest in the proceedings. It never was interested in the deficiency findings (the confirmation and distribution orders (R., 30) do not constitute judgments).

Prudential, on the other hand, was under its mortgage entitled to take the rents and profits (see paragraph 12 of petition for foreclosure, R., 5) and would, in any event, have been entitled to possession, after condition broken, under the law of Ohio. (See authorities cited in **Kerr v. Lydecker**, *supra*.) The receivers were appointed on its prayer and at its instance. Thus, on the uncontested allegations of the petition the receivership was primarily for Prudential's benefit. See **Hutchinson, Assignee, v. Straub**, 64 O. S., 413, holding that where the mortgage pledges the rents and profits, the mortgagee is entitled to them as against an assignee for the benefit of creditors. Judge Spear said at page 416:

"Manifestly in equity the mortgagee had the right, by virtue of the stipulations in the mortgage, to sequester the rents, and the only question remaining is as to the manner of enforcing such right. Ordinarily the method would be by the appointment of a receiver auxiliary to a foreclosure suit. But why should that be held to be the only way?"

Here it will be remembered that at the time of the institution of the foreclosure proceedings, an involuntary petition in bankruptcy against H. M. Crites had been filed. Had the trustee in bankruptcy taken possession of these farms, he would of necessity have accounted to the Prudential for so much of the net rents and profits thereof as would be needed, after foreclosure sale, to satisfy the Prudential's claims.

The district judge took cognizance of this very practical aspect of the situation when he directed the receivers to cooperate with the representatives of Pru-

dential in the management of the farms, and when, at the time the accounts were tendered for filing, he remarked that the accounting was between the Prudential and the receivers and that no one else was interested in it.

Notwithstanding all this, the record shows and the lower tribunals have concurrently found that Simkins, when first approached by Jones, passed on all the information he then had (excepting the fact that he had agreed to help Jones) to the district judge and also directly to counsel for the petitioner. The record also shows, incontrovertibly, that additional facts, covering the particulars of Jones' offer to Prudential and its acceptance, were stated in open court at the time of the confirmation, of which petitioner had notice. Whether the district judge was then apprised of the identity of the purchaser does not appear and was not clearly recalled by the witnesses. If Judge Hough had been living at the time of the investigation that point might have been made clear.

So there is no substantial basis in the record and the concurrent conclusions of fact of the lower tribunals for petitioner's complaint here made that it was deprived by want of knowledge available to it, of an opportunity to protect its interests by seasonable objections (Petitioner's brief, pp. 19, 20). Its counsel were either present at the hearing on confirmation, or, having ample notice of it, they neglected to attend. At that time it was or would have been known to the petitioner at least that Jones, with Simkins as a witness had, prior to the marshal's sales, offered in writing to buy from Prudential, should it buy in the properties, at a price in excess of the

mortgage indebtedness; and this knowledge would have come from Simkins and the Prudential, as represented in the court on that occasion by Mr. Harrison. The petitioner could then, had it been so advised, have resisted the motions to confirm and moved to have the sales set aside in order "to give the petitioner an opportunity to bargain with the prospective purchaser."

Of course all this would have been futile in any event, as the Circuit Court of Appeals saw; for the concurrent conclusions of fact are that Proctor, Jones' principal, did not wish to deal with Crites, Inc., or with anyone other than Prudential, from which he desired a warranty deed for the farms as a whole. (R., 391.)

So we submit that the findings of the Circuit Court of Appeals, the master, and the District Court, to the effect that the interests of Crites, Inc., were in no wise prejudiced by anything that transpired, are amply supported by the evidence in the record and, as indicated by all the decisions of this court, are to be followed here.

II.

The Growing Crops.

Prudential, under orders of court, had advanced considerable sums to the receivers for the payment of current and delinquent taxes, insurance premiums, etc. (R., 11, 27, 42). The District Court, with full knowledge of the fact that the Prudential had agreed to resell the Madison county farms together with growing crops, had confirmed the marshal's sales to it. He had advised the receivers that their landlord's interest in the growing

crops belonged to and was to be accounted for by the receivers (R., 136). In this situation the receivers on October 2, 1933, applied for instructions as to the disposition of the growing corn crops and were ordered, authorized and directed to sell them to the plaintiff (Prudential) for prices stipulated in the several orders (R., 19) which the record shows were arrived at by valuations fixed by disinterested appraisers. Both receivers joined in this proceeding.

It is clear from the record that the district judge knew at this time that Simkins had had some connection with the transaction between Prudential and Jones, as his name appeared as that of a witness on the document which had been filed with the court; whether he knew more than that does not appear, and his lips are closed in death.

Respondents respectfully submit that under these circumstances this transaction, directly ordered by the court, comes within the exception recognized by all the cases which have been examined, viz., that where the transaction is authorized or approved by the court, a receiver may participate in it, though it involves dealing with the subject matter of the receivership. We need not repeat the citations of the cases which recognize this exception.

III.

The Agreement, as to Fees Between Simkins and Ingalls.

The opinion and decision of the Circuit Court of Appeals in disallowing additional fees to counsel for the receivers without penalizing Simkins, the receiver, by ordering him to repay his receivers' fees, is criticized by the petitioner as "incongruous" (Brief, p. 15), for which petitioner professes to be at a loss to find any logical basis (p. 34).

It is true that the agreements as to fees did not come to light until the investigation and was not known to Judge Hough during his life, as found by the Circuit Court of Appeals (R., 392, 393). However, the Circuit Court of Appeals was here exercising a judicial discretion. The court evidently thought it sufficient ground for discrimination between Ingalls on the one hand and Simkins on the other hand that the record showed that Ingalls had actually divided his fee as attorney for the Prudential with Simkins, whereas Simkins, though no question had been raised, had not divided with anyone the compensation which had been allowed to him as receiver by the court. The matter is not one in which the petitioner has any interest (R., 393). It is a problem for the court of equity to determine what shall be done to "vindicate the proprieties." Respondents recognize that the issue as to the propriety of the disallowance of a part of Ingalls' fees is not before this court; they suggest, however, that the Circuit Court of Appeals has gone far enough in the matter.

IV.

The Petitioner's Laches and Acquiescence.

That equity rewards the diligent and not those who sleep on their rights is a fundamental maxim. We take it for granted that the principle thus expressed will be applied on exceptions seeking to surcharge the accounts of a receiver the same as it would be applied in a formal suit initiated by bill of complaint. In other words, in so far as by this means the petitioner seeks a recovery which it conceivably could have sought by another form of equitable proceeding, its equities are the same here as they would be in such other proceeding.

In certain of the cases previously cited equitable relief was denied to a complainant who with knowledge, actual or constructive, of the essential facts had delayed the presentation of his grievance to a judicial tribunal until intervening circumstances had so changed the position of his adversary as to put the latter at a disadvantage.

Twin Lick Oil Co. v. Marbury, *supra*;

Starkweather v. Jenner, *supra*.

The principle is a very familiar one. It was recognized by this court in the leading case of **Hammond v. Hopkins**, 143 U. S., 224, a case similar on its facts to the case at bar, wherein Mr. Justice Fuller said at pages 250 and 251:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the

peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or there long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. **Marsh v. Whitmore**, 21 Wall., 178; **Landsdale v. Smith**, 106 U. S., 391; **Norris v. Haggin**, 136 U. S., 386; **Mackall v. Casilear**, 137 U. S., 556; **Hanner v. Moulton**, 138 U. S., 486.

The main contention here is that the sale of May 10, 1864, should be set aside as to the purchases by the trustees through Chapman, on the ground of constructive, coupled with actual, fraud.

Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly. But such a purchase is not absolutely void. It is only voidable, and as it may be confirmed by the parties interested, directly, so it may be by long acquiescence or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the *cestui que trust*."

Instances of the application of the doctrine in the lower Federal courts are numerous. See **Mercantile Trust Co.**

v. Kanawha Ohio Railway Company, 58 Fed., 6 (holder of receiver's certificates held precluded by three years' delay after confirmation of sale and distribution from asserting the priority of the lien of his certificates). In this case Taft, C. J., used language which has apt application to the facts in the case at bar:

"If the holder of receiver's certificates were in court at the time of the entry of the decree of distribution, protesting against and excepting to the same, it seems perfectly manifest that his only recourse would be by appeal from the decree, and, on a failure to appeal, the decree would finally cut off his rights. The controversy would then have become *res adjudicata*. * * * Does the Adams Express Company, as a holder of receiver's certificates, stand in any better position than if it had been present by counsel in court when the final decrees of confirmation; release and distribution were entered, objected to the same? It is very clear that it does not. * * *

It is said that the company had the right to await notice from the receiver before presenting its claims. We do not think so. If it relied on the receiver, it was a personal trust, in which it has been deceived and must bear the loss. It was its plain duty at an earlier day to advise the court of its claim against the receiver and the railroad. * * *

For three years the company made no demand of any kind. This was laches of the grossest character, and entitles it to no consideration in a court of equity."

This doctrine is clearly applicable to the petitioner in the case at bar, which was a **party** to the foreclosure proceeding and chargeable with notice of all orders and proceedings of the court therein.

See also **Eiffert v. Craps** (C. C. A., 4), 58 Fed., 470 (laches imputed to one who failed to inspect a recorded

deed; here inspection of the record of the deed from Prudential to Mary E. Johnston would have disclosed the face value of the revenue stamps).

In **Poster v. Mansfield C. & L. M. Railroad Co.**, 146 U. S., 88, 99, this court said:

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

This case was a bill to set aside a foreclosure sale on the ground of fraud and collusion. It appeared that, in the interval between the sale and the filing of the suit "many of the witnesses, including both Cass and Scott, trustees, whose alleged fraudulent betrayal of their trust is the gravamen of this bill are dead." Many other cases in which delay has been held fatal on account of the death of material witnesses or the obscuration of evidence through failing recollection of witnesses are cited in Pomeroy's Equity Jurisprudence, 4th ed., Vol. 4, Section 1443, pages 3425, 3426.

Alternative remedies were open to the petitioner in this case. As suggested by the master, it could have obtained a citation to compel the receivers to file their accounts at an earlier date, proceeding in that respect as Mr. Ingalls and the receiver Florence undertook to do on the erroneous assumption that the originals were in the possession of the Prudential; it could have objected

to the confirmation of the sales; it could have brought suit to set aside the sales, even after confirmation, if it could have shown that knowledge of the facts on which it would predicate its claim had not come to or been available to it until after confirmation. Instead of promptly pursuing any of these available methods of enforcing their supposed rights, it voluntarily chose to wait until the receivers' substituted accounts were filed. If the gist of the petitioner's complaint is actual or constructive fraud on the part of the receiver Simkins and the Prudential, as hinted in the respondent's brief, other and more appropriate remedies are available to it.

So respondents respectfully submit that on this record petitioner has failed to show that it has been sufficiently diligent to entitle it to the equitable relief which it seeks. Both the special master and the Circuit Court of Appeals commented on petitioner's delay, lack of interest and acquiescence (R. 70, 393); but, as they found against the petitioner on the merits of its claims as regards Simkins, it was not necessary for either to predicate decision upon this laches.

CONCLUSION.

In conclusion, respondents submit that the material facts in this case have been found adversely to the contentions of the petitioner by the concurrent conclusions of the special master, the District Court and the Circuit Court of Appeals; that these conclusions are supported by substantial evidence in the record and should not be here disturbed; that the inferior tribunals have cor-

rectly applied the law to those facts, so far as the claims against the receiver Simkins are concerned (see the master's comprehensive and careful investigation and discussion of the authorities; R., 79 to 86, inclusive) and that the judgment of the Circuit Court of Appeals in that regard should be affirmed. Respondents further submit that under all the circumstances disclosed by the record the special master and the District Court, being fully advised, reached a sounder conclusion with respect to the matter of the division of fees than did the Circuit Court of Appeals when, on its own motion, it took disciplinary action in the premises; and that the judgment of the District Court in that regard ought to be affirmed.

Respectfully submitted,

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 317.—OCTOBER TERM, 1943.

Crites, Incorporated, Petitioner,
vs.
The Prudential Insurance Company
of America, Richard Simkins and
George Florence.

On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Sixth
Circuit.

[May 22, 1944.]

Mr. Justice MURPHY delivered the opinion of the Court.

We granted certiorari in this case to determine certain important questions concerning the proper administration of federal receiverships.

Henry M. Crites and his wife, May R. Crites, executed mortgages in 1929 to the Prudential Insurance Company of America upon 22 parcels of adjoining farm property in Madison and Pickaway Counties, Ohio. Each mortgage, being in default, was matured by acceleration on December 30, 1931. On February 17, 1932, Prudential began 22 separate foreclosure proceedings against the Crites and Crites, Inc., the petitioner. Only the 11 proceedings relating to the 11 contiguous farms in Madison County, on which the mortgages aggregated \$192,000, are now before us.

An involuntary petition in bankruptcy had been filed against Henry M. Crites. Petitioner is an Ohio corporation formed by Crites' creditors in an effort to salvage something from the farms. To it had been conveyed all the properties of the Crites, including the equities of redemption. Prudential requested that a receiver be appointed to take charge of the mortgaged farms pending the termination of the foreclosure proceedings. The District Court accordingly appointed as co-receivers the respondents Simkins and Florence "to collect the rents and proceeds of the real estate . . . to operate and manage said real estate through tenants, lessees, or otherwise, to rent and lease said real estate, to pay delinquent taxes and assessments and insurance premiums, to make such repairs as may be necessary to preserve the value of the premises and to produce normal income therefrom, and to do such other acts as may be from time to time ordered by the

court." Subsequent orders authorized them to borrow money from Prudential and from the local bank to pay necessary expenses relating to the farms and to execute leases of the farms upon a share or crop rental basis.

No answers to the foreclosure complaints were filed. In the hope that economic conditions would improve and bring about a higher sale value, the District Court allowed the receivers to operate the farms for a year before entering decrees *pro confesso* on May 2, 1933. By these decrees the mortgages and equities of redemption were declared foreclosed and the marshal was directed to sell each farm individually on July 1, 1933, at a public sale for cash at not less than two-thirds of the appraised value. The appraisers set the value of the 11 Madison County farms at \$244,080, making \$162,720 the minimum price at which they could be sold. The decree indebtedness in the 11 cases was \$223,742.32. Prudential made the sole bids at the public sale on July 1 and secured title to the 11 farms for \$163,900, slightly more than the upset price. The District Court confirmed this sale on July 18.

Prudential subsequently objected to the allowance of the receivers' claims on the ground that they were excessive. Petitioner also filed objections. Hearings were held before a special master. The District Court overruled petitioner's exceptions to the special master's report and its counterclaim, amended and approved the receivers' accounts, and affirmed the special master's report. Petitioner alone appealed, the court below affirming the action of the District Court with a slight modification as to additional fees for the receivers' attorneys. 134 F. 2d 925.

I.

Petitioner's first contention is that Simkins' actions in connection with the foreclosure sales constituted a breach of his duty as a receiver and rendered him accountable for certain profits made by him and others.

The evidence indicates that a Col. Proctor of Cincinnati was interested in purchasing the entire 11 Madison County farms as a unit and that he employed a real estate agent, Edwin Jones, to represent him in the matter. Several weeks before the foreclosure sales, Jones visited Simkins and told him that he under-

1. Jones was familiar with the 11 Madison County farms, having made an offer of \$500,000 for them "a year or more" prior to 1933 on behalf of a New York principal. Crites rejected this offer, however.

stood that Simkins was one of the attorneys in the matter and that he was interested in buying the farms. Simkins, in addition to being one of the co-receivers, was an attorney who had represented Prudential in other foreclosure proceedings in Ohio and who had served Jones in a professional capacity on other matters. Simkins replied that "we are in no position to offer it right now, not in position until after the foreclosure proceedings and the Prudential Insurance Company acquires title for it, then they will be in position to offer it to anybody else trying to buy it." Simkins agreed, however, to intercede on Jones' behalf. They then drew up a contract whereby Simkins was to assist Jones in securing title to the 11 farms from Prudential after the latter had secured title by purchase at the public sale. The compensation of Simkins was dependent upon the success of the deal. Simkins did not know at this time the name of Jones' principal or how much the principal was willing to pay for the farms as a unit. Simkins then informed petitioner's counsel and the district judge that there "might be some parties interested" in the 11 farms as a unit, but was informed that they could not be sold as a group. It does not appear that he told counsel or the court that he had accepted employment from Jones.²

At Jones' request, Simkins conferred on June 25, 1933, with Prudential representatives concerning the possibility of purchasing the 11 farms from Prudential. No definite arrangements were then made, the representatives stating that they could not discuss terms until Prudential had bought the farms at the sale. On June 27 Jones submitted through Simkins a written offer of \$249,106 to Prudential for the 11 farms, including "the company's undivided one-half interest in the growing corn crop thereon." The offer was witnessed by Simkins and another person and was enclosed in a letter which was addressed to one of Prudential's representatives and which was signed by Simkins. In this letter Simkins vouched for the responsibility of "Mr. Jones' buyer." Jones also enclosed a \$3000 certified check in support of his offer. Simkins by this time clearly was aware of the identity of Jones' principal and of the terms of the offer to Prudential. But he made no effort to inform either the district judge or petitioner of these facts prior to or at the sale.

² Simkins testified that the fact of his employment by Jones "was no secret" and that "I may have told Judge Hough. I would not have hesitated in telling him."

At the public sale held by the marshal on July 1, Prudential made the sole bids and secured title to the 11 farms for a total sum of \$163,900. Jones attended the sale but Col. Proctor had not authorized Jones to bid since he desired to buy only when he could be assured of securing all the 11 farms at once and when title to them was supported by a warranty deed from Prudential. Two days later, on July 3, Prudential accepted Jones' offer, of \$249,106.

Prudential then moved to confirm the public sales, giving due notice to petitioner of the hearing on the motion. At this hearing on July 18, objections to the motion "were suggested by reason of alleged commitments made by the plaintiff [Prudential] for the sale of certain of said properties, prior to public sale." It does not appear who made these objections, or whether the petitioner's counsel was present. Harrison, one of the attorneys for the receivers, thereupon orally advised the judge of the terms and amount of Jones' offer, and its acceptance by Prudential. At the judge's suggestion, Harrison set forth these facts, in the form of an affidavit, which was later introduced at the hearing on the receivers' accounts. The court was not informed, however, as to Simkins' participation in the matter or as to the fact that Col. Proctor was the actual purchaser of the farms. Simkins was present in the court room at this time but said nothing. The judge confirmed the sales on the same day, July 18. Soon afterwards Prudential executed a warranty deed to Col. Proctor's nominee, the deed reciting a consideration of \$249,106 but bearing tax stamps apparently indicating a substantially greater price.

Simkins received a total of \$2,797 from Jones, nearly all of which was in payment for his aid in consummating the purchase of the farms from Prudential.

On the basis of these facts, petitioner seeks to have Simkins surcharged with (a) all payments received by him from Jones for his assistance in consummating the resale of the farms to Col. Proctor; (b) the commission or profit received by Jones; and (c) the amount received by Prudential in excess of the decree indebtedness or, in the alternative, the amount by which the ap-

³ Petitioner claims that the stamps indicate that Col. Proctor paid approximately \$281,000, "presumably, \$249,106 net to Prudential . . . and the difference of \$31,894 to Jones." There was no proof, however, that Jones received that amount. He testified merely that he received \$15,000 and an additional amount that he did not remember, from which amounts he paid Simkins.

praised value of the farms exceeded the decree indebtedness. Petitioner claims that Simkins must be surcharged with these amounts because he breached his duty as co-receiver by accepting employment from Jones in advance of the foreclosure sales to help bring about a resale of the farms from Prudential to Col. Proctor. Respondents, on the other hand, resist this claim on the ground that Simkins was appointed co-receiver only to collect the rents and to operate the farms and had no fiduciary duty with respect to the foreclosure sales.

It is true that Simkin's official duties as co-receiver were limited to those conferred upon him by the court and that he had no authority to sell or to cause a sale of the farms in question. The foreclosure sales were conducted by the marshal under the direct supervision of the District Court and there was no evidence that Simkins unduly influenced the actual execution of the sales in any way. It is obvious, moreover, that Simkins was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary. He was not free to deal with the property under his control as co-receiver in such a way as to benefit himself or his associates. Any profits that might have resulted from a breach of these high standards, including the profits of others who knowingly joined him in pursuing an illegal course of action, would have to be disgorged and applied to the estate. *Meacham v. Girard*, 4 How. 503; *Magruder v. Deury*, 225 U. S. 106; *Jackson v. Smith*, 254 U. S. 586.

But Simkins' conduct is not to be measured solely by the arbitrary dichotomy of functions relating to the conservation and liquidation of the farm properties. As a co-receiver in charge of collecting the rents and operating the farms, Simkins was also an officer of the court. He was appointed to assist the court in protecting and preserving, for the benefit of all parties concerned, the properties in the court's custody pending the foreclosure proceedings. *Booth v. Clark*, 17 How. 322, 331; *Davis v. Gray*, 16 Wall. 203, 217-218; *Starch v. Boulware*, 133 U. S. 78, 81; *Porter v. Sablin*, 149 U. S. 473, 479; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 370-371. The court's authority and duties, however, covered all phases of the foreclosure proceedings. They included not only the conservation but the liquidation of the farm properties. The court had discretion to delegate these duties as it saw fit. But whatever the functional distribution, all the court officers were bound to act fairly and openly with respect to

every aspect of the proceedings before the court. The mere fact that any one aspect did not fall within the delegated function of a particular court officer did not give that officer free rein to act in a secret, non-judicial manner as to that aspect. The court, as well as all the interested parties, had the right to expect that its officers would not make undisclosed private agreements, fail to reveal any pertinent information or use their official position for their own profit or to further the interests of themselves or any associates.

It is impossible to reconcile the activities of Simkins relating to the foreclosure sales with the basic standard of conduct demanded of him as an officer of the court. One of the prime purposes of the foreclosure proceedings was to obtain enough money from the farm properties to pay in full the mortgage indebtedness, with any surplus going to the owner of the equities of redemption. All information to that end which came to Simkins or to any other court officer belonged to the court and to the parties interested in the foreclosure proceedings. Here Simkins had knowledge of a prospective purchaser of the farms who was willing to pay more than the mortgage indebtedness on the properties. Yet he made no effort to reveal this important information prior to the foreclosure sales other than to state that there "might be some parties interested" in buying the 11 farms as a unit. He was told that the court could not order a public sale of the farms as a unit. But it is clear that the court and petitioner might well have profited if Simkins had more fully revealed to them in advance of the sales that there was a prospect of selling all 11 farms to a responsible buyer at an advantageous price. Petitioner could well have been given the opportunity to bargain directly with Col. Proctor for a private sale of the farms as a unit. This suppression of vital information was in no way mitigated by the partial revelation of the facts at the hearing on the motion to confirm the sales to Prudential, after Prudential had accepted the resale offer, or by any subsequent knowledge obtained by petitioner. The information was most valuable prior

The special master and the court below found that Col. Proctor was interested in purchasing the 11 farms as a unit only if he could obtain a warranty deed from Prudential. But there was no evidence that petitioner could not have furnished muniments of title equally satisfactory to Col. Proctor or that he would not have been satisfied with a warranty deed from petitioner. According to Jones, Col. Proctor "said a general warranty deed from the Prudential Insurance Company was good enough for him."

to the foreclosure sales when the prospects were greater for successful bargaining, and it should have been divulged at that time.

Moreover it was inconsistent with his position as an officer of the court for Simkins to make a secret arrangement with Jones to bring about, by active intervention, a resale of the properties in the custody of the court. The fact that he was not a liquidating receiver did not absolve him of the duty to act openly at all times with respect to the subject matter of the proceedings. Due regard for his official position demanded that he at least notify and obtain the approval of the court and of the interested parties before entering into an employment contract with a third party wherein his compensation was dependent upon a particular bidder being successful at the foreclosure sales. This arrangement brought out in even bolder relief the reprehensibility of Simkins' failure to disclose all the facts regarding Col. Proctor's interest in purchasing the farms. Had such facts been revealed prior to the public foreclosure sales, Prudential might not have obtained title to the farms and Simkins would not have earned any compensation under his contract with Jones. It was thus to Simkins' personal benefit not to disclose all the pertinent facts.

Since the course taken by Simkins was one which he as an officer of the court could not legally pursue and since profits resulted to him, the law makes him accountable to the trust estate for all such profits. Cf. *Magruder v. Deary*, *supra*; *Jackson v. Smith*, *supra*. We need not speculate as to whether his conduct operated to dampen the foreclosure sales to any appreciable degree or whether the estate was in any other way injured. It is enough that his activities had a tendency to dampen the sales. For that reason alone he may be held to forfeit all profits he derived from his misconduct, regardless of whether it actually had an adverse effect or not. In this type of situation "the incidence of a particular conflict of interest can seldom be measured with any degree of certainty." *Woods v. City National Bank & Trust Co.*, 312 U. S. 262, 268. Proof of profits resulting from an irregular or conflicting course of conduct is sufficient. Simkins was thus accountable for the payments received by him from Jones for his assistance in consummating the resale of the farms from Prudential to Col. Proctor.⁵

⁵It is unnecessary to consider petitioner's argument relating to the sale to Prudential of the growing crops on the farm lands, inasmuch as petitioner seeks to surcharge Simkins with the same amounts as in connection with the

Under the circumstances of this case, however, Simkins was not surchargeable with the commission received by Jones, with any amount received by Prudential or with the amount by which the appraised value of the farms exceeded the decree indebtedness. We perceive no basis in this record for holding Simkins responsible for any possible misconduct on the part of Jones or Prudential or for any profits that they may have obtained thereby. We do not, of course, determine in this proceeding whether petitioner could recover any such profits in a direct action against either Jones or Prudential.

II.

Petitioner also claims that Simkins should be surcharged with all his receivership fees because of a fee-splitting arrangement which he made with Harrison and Ingalls, the attorneys for the co-receivers as well as for Prudential. The three agreed to pool the fees allowed them by the District Court and to divide them equally, although this arrangement apparently was not completely carried out.

Petitioner excepted to all credits in the receivers' accounts for fees to either Simkins or Ingalls because of this arrangement. The court below allowed credit to the receivers for the \$250 fees received by Harrison and Ingalls from the court as preliminary compensation and for all out-of-pocket expenses incurred by the two attorneys on behalf of the estate. But all credits were denied for additional attorney fees paid to them. Petitioner objects to the failure to disallow the \$250 fee allowed Simkins by the District Court and the additional \$1,800 fee which he paid to himself on account of his services as co-receiver.

A fee-splitting arrangement of this nature is clearly unenforceable and void as against public policy. *Wail v. Nearn*, 27 F. S. 160. But whether the parties to such a contract should be allowed any fees at all, and if so the amount thereof, are normally matters within the sound discretion of the District Court and are not reviewable except where a clear abuse of discretion is apparent. In this case, however, the fact that Simkins entered

sale of the lands and no different considerations are present. Respondents claim that petitioner is barred from relief because of laches is without merit. Nothing in the record indicates that petitioner discovered the full facts concerning Simkins' activities until several years after the foreclosure sales. Petitioner then made timely exceptions to the receivers' accounts.

into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretions incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as co-receiver should have been denied him: Cf. *Woods v. City National Bank & Trust Co.*, *supra*, 268.

The judgment of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

Mr. Justice ROBERTS.

I am of opinion that certiorari should not have been granted in this case and that the writ should be dismissed.

The Circuit Court of Appeals recognized established principles in determining to what extent the respondent Simkins should be denied compensation for services by reason of his acting in inconsistent relations. That court canvassed authorities which this court cites in its opinion and not only did not refuse to follow and apply them but, as I think, in perfect good faith, proceeded to examine and appraise the facts and circumstances in order to apply the relevant legal principles.

There is not a suggestion of any conflict amongst the federal courts respecting the law which should govern decision nor is there any suggestion that, on an identical set of facts, any federal court has reached a result contrary to that reached by the court below. In essence, the case presents the question whether the action taken by the Circuit Court of Appeals was sufficiently drastic in the circumstances disclosed.

I think it plain that this case falls within the category to which I referred in *Bailey v. Central Vt. Ry. Co.*, 319 U. S. 350, 354. All the considerations there mentioned apply equally here. If this court is to spend its time correcting mistakes in the appraisal of facts in individual cases by courts below the performance of its essential functions necessarily will suffer.